No. 87-6116-CSY
Status: GRANTED

Title: Steven A. Penson, Petitioner
v.
Ohio

Docketed:
December 21, 1987

Court: Court of Appeals of Ohio,
Montgomery County

Counsel for petitioner: Ayers,Gregory L.

Counsel for respondent: Millspaugh,Ted E., Robinette,Mark Burton

Entry	Date	Note	Proceedings and Orders
1	Dec 21 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jan 13 1988		Brief of respondent Ohio in opposition filed.
4	Jan 21 1988		DISTRIBUTED. February 19, 1988
6	Feb 22 1988		Petition GRANTED.
			**********
7	Mar 2 1988	G	Motion of petitioner for appointment of counsel filed.
8	Mar 8 1988		DISTRIBUTED. March 18, 1988. (Motion of petitioner for appointment of counsel).
9	Mar 21 1988		Motion for appointment of counsel GRANTED and it is ordered that Gregory L. Ayers, Esquire, of Columbus, Ohio, is appointed to serve as counsel for the petitioner in this case.
11	Mar 21 1988		Order extending time to file brief of petitioner on the merits until April 21, 1988.
12	Mar 29 1988		Joint appendix filed.
15	Apr 18 1988		Brief amici curiae of ACLU, et al. filed.
13	Apr 20 1988		Lodging received.
14	Apr 20 1988		Brief amicus curiae of Ohio Assn. of Criminal Defense Lawyers filed.
16	Apr 21 1988		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed.
17	May 9 1988		Brief of petitioner Steven A. Penson filed.
18	May 13 1988		Record filed.
		*	Certified copy of original record received.
20	May 13 1988		Order extending time to file brief of respondent on the merits until June 6, 1988.
22	Jun 3 1988		Brief of respondent Ohio filed.
23	Jun 23 1988		CIRCULATED.
24	Jul 6 1988	X	Reply brief of petitioner Steven A. Penson filed.
25	Jul 6 1988		LODGING by petitioner (unreported decisions)
26	Jul 15 1988		Set for argument. Wednesday, October 12, 1988. (3rd case) (1 hr.)
28	Oct 12 1988		ARGUED.

87-6116

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEVEN ANTHONY PENSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RANDALL M. DANA
Ohio Public Defender

GREGORY L. AYERS
Chief Counsel
Counsel of Record

GEORGE A. LYONS
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long Street, 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. CAN APPELLATE COUNSEL'S FAILURE TO FILE A BRIEF ON DIRECT APPEAL BE CONSIDERED NON-PREJUDICIAL OR HARMLESS ERROR AS THE STATE COURT OF APPEALS FOUND?

II. WHEN THE STATE COURT OF APPEALS DETERMINED THAT THERE WERE ARGUABLE ISSUES THAT COULD BE RAISED ON APPEAL, WAS THE COURT OF APPEALS REQUIRED TO AFFORD PETITIONER THE ASSISTANCE OF COUNSEL BEFORE REVIEWING HIS CASE AND AFFIRMING HIS CONVICTIONS?

III. WERE PETITIONER'S RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AND EFFECTIVE ASSISTANCE OF COUNSEL ON HIS APPEAL OF RIGHT DENIED WHEN THE STATE COURT OF APPEALS PERMITTED PETITIONER'S COUNSEL TO WITHDRAW, SUBSEQUENTLY FOUND ARGUABLE ISSUES IN HIS APPEAL BUT REFUSED TO APPOINT NEW COUNSEL FOR HIM, AND ONLY CONSIDERED THE ARGUABLE ISSUES RAISED IN PETITIONER'S CO-DEFENDANTS' APPEALS?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

_____

STEVEN ANTHONY PENSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

_____

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

_____

The petitioner, Steven Anthony Penson, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Ohio entered in the above-entitled proceeding on October 21, 1987.

OPINIONS BELOW

The Ohio Supreme Court overruled petitioner's motion for leave to appeal and claimed appeal as of right from the judgment and decision of the Second District Court of Appeals, Montgomery County, Ohio. A copy of the Court's entry appears in the Appendix to the Petition at A1. The opinion of the Second District Court of Appeals of Ohio is unreported but is attached in the Appendix at A2.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on October 21, 1987, and this petition was timely filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States which provide, in pertinent part:

SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

STATEMENT OF THE CASE

Petitioner, Steven Anthony Penson, was indicted for twenty-one (21) counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; one count of gross sexual imposition; and one count of having a weapon under disability. **State v. Penson** (June 5, 1987), Montgomery App. No. 9193, unreported, at 2-3 (attached in Appendix at A2). Each count contained a firearm specification and a specification of a prior felony conviction. **Id.** After a jury trial in the

Montgomery County, Ohio Court of Common Pleas, petitioner was found guilty of fourteen (14) counts of rape; aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; attempted rape; gross sexual imposition; and having a firearm under a disability. Petitioner was also found guilty of all firearm specifications. **Id.** On December 21, 1984, petitioner was sentenced to a term of imprisonment of eighteen (18) to twenty-eight (28) years. **Id.**, at 3.

Petitioner appealed the judgment of the Montgomery County Court of Common Pleas to the Second District Court of Appeals of Ohio.

On June 2, 1986, appellate counsel filed a "CERTIFICATION OF MERITLESS APPEAL" along with a motion to withdraw as appellate counsel, attached in the Appendix at A9. **State v. Penson**, at 4. On June 9, 1986, the Court of Appeals granted appellate counsel's motion to withdraw, and granted petitioner 30 days to file his own brief. **Id.** The court granted successive extensions and petitioner's request to borrow the trial transcript. On November 13, 1986, the court denied petitioner's request for appointment of new counsel, but granted him 15 more days to use the transcript. **Id.** Following a final 25 day extension petitioner failed to file a **pro se** brief. **Id.**

The Court of Appeals reviewed the record of the trial court proceedings to determine if petitioner received a fair trial and whether any prejudicial error occurred. The court stated that it was troubled by counsel's filing an **Anders** brief[1] and that counsel's conclusion that there were no errors which could arguably support was highly questionable. **Id.**, at 4-5. The court concluded this because "considerable briefs" were filed by

[1] Petitioner submits that the Court of Appeals' characterization of counsel's "certification of meritless appeal" as an "Anders brief" is inaccurate as it did not raise any errors or issues that could arguably support the appeal. See **Anders v. California**, 386 U.S. 738, 744 (1967).

petitioner's co-defendants in their respective appeals. **Id.**, at 5. The court further found "[t]he record of the trial court does support several arguable claims." **Id.**

Nevertheless, the court determined that because it had examined the record and already considered the assignments of error raised in the other defendant's appeals, "appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record." **Id.**

Pursuant to it's own review of the record, the court of appeals did address one issue. The court determined that the trial court failed to charge the jury on one of the elements of the crime of felonious assault in count six of the indictment. The conviction on that court was reversed and the sentence vacated. **Id.**, at 7. Petitioner's convictions were otherwise affirmed.

Petitioner timely appealed to the Supreme Court of Ohio. On October 21, 1987, the Supreme Court dismissed his appeal on the ground that no substantial constitutional question existed. Ohio Supreme Court Entry, Appendix at A1.

A. How The Federal Issues Were Raised And Decided Below

As indicated above, petitioner's counsel on direct appeal filed a motion, which stated in pertinent part:

> CERTIFICATION OF MERITLESS APPEAL
>
> Appellant's attorney respectfully certifies to the Court that he carefully reviewed the within record on appeal ... that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1401, and that he will not file a meritless appeal in this matter.
>
> MOTION
>
> Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated effective on the date file-stamped on this Motion.

Appendix, at A9.

The Court of Appeals subsequently reviewed the record for error and determined:

> Initially, this court is troubled by the filing of an **Anders** brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants' Brooks' and Smith's counsel in their respective appeals. Because we have thoroughly examined the record and already considered the assignments of error raised in the other defendants' appeal, we find appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record.
>
> The record of the trial court does support several arguable claims. Our full consideration of each may be examined in the decisions rendered in the companion defendants' appeals. **See, State v. John A. Smith** (May 13, 1987) Montgomery App. No. 9168, unreported and **State v. Richard Brooks** (June 4, 1987) Montgomery App. No. 9190, unreported.
>
> In examining the record, we find one issue which requires our attention.***

State v. Penson, Appendix, at A5-6. The Court of Appeals did vacate petitioner's conviction for felonious assault, but otherwise affirmed his other convictions.

In petitioner's appeal to the Supreme Court of Ohio, he raised the following propositions of law.

1. Where appellate counsel files an **"Anders** brief" which does not comply with **Anders v. California** (1967), 386 U.S. 748, the appellate court must require counsel to comply with **Anders**, or appoint new appellate counsel, in order to guarantee appellant the due process and equal protection to which he is entitled under the Ohio and United States Constitutions.

2. An appellate court's examination of the record revealing merit in an **"Anders** brief" appeal requires the appointment of new counsel to prosecute the appeal, before a decision on the merits may be rendered in conformity with due process and equal protection of the law.

The Supreme Court overruled petitioner's motion for leave to appeal and claimed appeal as of right on the ground that no substantial constitutional question existed. Ohio Supreme Court Entry, Appendix at A1.

REASONS FOR GRANTING THE WRIT

1. The Ohio Courts' Continuing Failure To Require Compliance With Anders v. California, 386 U.S. 738 (1967).

At least five Ohio Courts of Appeal do not require appointed counsel on appeal to file a brief in compliance with the procedures mandated by **Anders v. California**, 386 U.S. 738 (1967), when counsel decides there are no appealable issues.[2] Petitioner's case is yet another example of these Ohio appellate Courts' continuing deviation from **Anders**. In at least three of these cases,[3] the Supreme Court of Ohio has upheld the Court of Appeals' action.[4] Thus, unless this Court grants certiorari, petitioner and other similarly situated defendants in Ohio will continue to be denied their constitutional rights to equal protection, due process, and effective assistance of counsel on direct appeal.

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[2] **See, e.g.,** the following cases attached in the Appendix at A10-26. **State v. Freels** (April 4, 1984), Ham. App. No. C-830585, unreported; **State v. McLindon** (Nov. 5, 1986), Ham. App. No. C-850868, unreported (First Appellate District); **State v. Birchfield** (Dec. 8, 1986), Butler App. No. CA86-07-099, unreported (Twelfth Appellate District); **State v. Sykes** (Jan. 26, 1984), Mahoning App. No. 82CA115, unreported; **accord State v. Toney** (1970), 23 Ohio App.2d 203 (Seventh Appellate District); **State v. Poole** (Oct. 20, 1987), Allen App. No. 1-86-43, unreported (Third Appellate District); petitioner's case is from the Second Appellate District. **Cf. State v. Duncan** (1978), 57 Ohio App.2d 93 (Eighth Appellate District).

[3] **State v. Freels** and **State v. McLindon**, see fn. 1 and Ohio Supreme Court Entries, attached in Appendix, at A13 and A16, respectively; and the instant case.

[4] The Ohio Supreme Court has also upheld a similar decision by another Ohio Court of Appeals. **See Laws v. Jago**, No. C-1-78-64, U.S. District Court, S.D. Ohio, Western Division, February 25, 1980, attached in Appendix, at A27.

In **Anders**, 386 U.S. 738, this Court set out the minimum constitutional requirements for appellate counsel who finds an appeal to be frivolous, i.e., no appealable issues. Counsel is required to advise the court the appeal is frivolous and request permission to withdraw. **Id.**, at 744. The request to withdraw must "be accompanied by a brief referring to anything in the record that might arguably support the appeal". **Id.** The Court stated why it imposed these procedures:

> The constitutional requirement of substantial equality and fair process can only be attained where **"counsel acts in the role of an active advocate in behalf of his client as opposed to that of amicus curiae".** (Emphasis added.)

Accord Jones v. Barnes, 463 U.S. 745, at 754 (1983) ("Anders recognized that the role of the advocate requires that he support his client's appeal to the best of his ability").

In **Evitts v. Lucey**, 469 U.S. 387 (1985), this Court recognized the right to effective assistance of appellate counsel and reiterated that appellate counsel

> "must be available to assist in preparing and submitting a brief to the appellate court...and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim...".

Id., at 394. **Evitts** further reaffirmed **Anders'** minimum constitutional requirements for appellate representation:

> A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. This results is hardly novel. The petitioners in both **Anders v. California**, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967), and **Entsminger v. Iowa**, 386 U.S. 748, 18 L.Ed.2d 501, 87 S.Ct. 1402 (1967), claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases, we agreed with the petitioners, holding that **counsel's failure in Anders to submit a brief on appeal** and counsel's waiver in **Entsminger** of the petitioner's right to a full transcript **rendered the subsequent judgments against the petitioner unconstitutional.** (Emphasis added).

Id., at 396-397.

In petitioner's case, it is evident that appellate counsel did not comply with **Anders**. The "certification of meritless appeal" and motion to withdraw submitted by appellate counsel for petitioner did not set forth any assignments of error or refer to anything in the record which might arguably support the appeal. Counsel simply stated that he found no errors requiring reversal, modification, and/or vacation of petitioner's convictions or sentences and that he would not file a meritless appeal.

Moreover, the Ohio Court of Appeals failed to comply with **Anders** by failing to afford petitioner counsel once it determined there were several arguable grounds for appeal. **See State v. Penson**, Appendix at A5. As this Court stated in **Anders**, 386 U.S., at 744:

> ...if [the court] finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Thus, the minimum constitutional procedures established by this Court in **Anders** to guarantee a defendant's right to equal protection, due process and effective assistance of counsel on direct appeal were denied petitioner by the Ohio Court of Appeals.

The Ohio Supreme Court's subsequent dismissal of petitioner's appeal and those of similarly situated defendants, on the ground that "no substantial constitutional question exists," makes it apparent that Ohio's highest court will not require Ohio appellate courts to comply with **Anders** decision. Intervention by this Court is therefore necessary to guarantee petitioner and other defendants on direct appeal their fundamental constitutional rights to equal protection, due process, and effective assistance of counsel.

2. The Ohio Court of Appeals' Ruling That Appellate Counsel's Failure To File a Brief Can Be Considered Non-Prejudicial

or Harmless Error Is Inconsistent With the Decisions of This Court.

The Ohio Court of Appeals found that counsel's failure to submit a brief on the arguable claims in the record was non-prejudicial or harmless error. **State v. Penson**, Appendix at A2. Petitioner submits that the decisions of this Court indicate that prejudice must be presumed in this situation.

This Court's decision in **Evitts** makes this clear. In **Evitts**, 469 U.S. at 396-397, this Court stated that counsel's failure in **Anders** to submit a brief on appeal rendered the appellate court's judgment unconstitutional. The **Evitts** Court further held that appellate counsel **must** submit a brief to the court and play the role of an active advocate, rather than a friend of the court assisting in a detached evaluation of appellant's claim. **Id.**, at 394.

Strickland v. Washington, 466 U.S. 668, 692 (1984), and **United States v. Cronic**, 466 U.S. 648, 659 (1984), further indicate that prejudice need not be shown where there's a constructive denial of counsel.[5] Citing **Anders**, this Court held in **Cronic**, at 656-657:

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." **Anders v. California**, 386 U.S. 738, 743, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted-even if defense counsel may have made demonstrable errors-the kind of testing envisioned by the Sixth Amendment has occurred. **But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.** (Footnotes omitted). (Emphasis added).

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[5] While **Strickland** and **Cronic** involved claims of ineffective assistance of trial counsel, petitioner submits their presumption of prejudice analysis of claims involving a constructive denial of trial counsel is equally applicable to a constructive denial of counsel on appeal.

Thus, the Court acknowledged that it would presume prejudice and find a Sixth Amendment violation where there is either a denial of counsel at a critical stage of the trial or where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing...". **Id.**, at 659.

If the **Strickland** and **Cronic** principles are applied in the appellate context, it is evident that counsel's failure to file a brief violates the Sixth Amendment right to the effective assistance of counsel. First, counsel has not played the role of an advocate. Secondly, counsel who fails to file a brief has not subjected the prosecution's case, i.e., the accused's conviction, to meaningful adversarial testing on appeal. In this situation, a defendant on appeal is effectively without counsel. Under **Strickland** and **Cronic** standards, prejudice must be presumed.

In addition, the **Anders** requirement that an adequate brief be filed has been upheld by most federal circuit courts without a showing of prejudice.[6] In **Cannon v. Berry**, 727 F.2d 1020 (11th Cir. 1984), the Eleventh Circuit considered whether a showing of

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[6] See **United States v. Edwards**, 777 F.2d 364 (7th Cir. 1985) (Court denied counsel's motion to withdraw since he did not identify in his one-page "brief" any issues in the record that might conceivably be appealable); **Mylar v. Alabama**, 671 F.2d 1299 (11th Cir. 1982), **cert. denied**, ___ U.S. ___, 77 L.Ed.2d 1411 (1983) (Counsel's failure to submit a brief with appeal constituted ineffective assistance of counsel in that counsel did not function as an active advocate for his client; **United States v. Johnson**, 527 F.2d 1329 (5th Cir. 1976) (Counsel was denied permission to withdraw and ordered to submit a brief in compliance with **Anders** after counsel's first "brief" was deemed nothing more than a no-merit letter); **High v. Rhay**, 519 F.2d 109 (9th Cir. 1975) (Counsel rendered ineffective assistance when he merely stated the simple question of the sufficiency of evidence, failed to make a minimal statement of the facts, and invited the court to review the entire transcript itself); **Smith v. United States**, 384 F.2d 649 (8th Cir. 1967) (Permission to withdraw could not be granted due to counsel's failure to submit a brief referring to anything in the record that might be argued on appeal); **Suggs v. United States**, 391 F.2d 971 (D.C. Cir. 1968) (Counsel's brief which stated that there was no substance to the appeal does not satisfy **Anders**); **Robinson v. Black**, 812 F.2d 1084 (8th Cir. 1987) (Appellate counsel's brief inadequate where he briefed all issues in favor of government and concluded appeal was meritless.); **Cf. Griffin v. West**, 791 F.2d 1578 (10th Cir. 1986) (Absence of appellate brief not prejudicial because essential elements of the offense were uncontroverted).

prejudice was required to find ineffective assistance of appellate counsel where counsel fails to comply with **Anders**. The court found that counsel's failure to file a brief was the functional equivalent of having no counsel at all. **Id.**, at 1023. The Court reasoned:

> If a petitioner like Cannon had to show actual prejudice from the dismissal of his direct state appeal, notwithstanding the failure to follow the **Anders** procedures, there would be a considerable erosion in the enforcement of **Anders**.

Id., at 1024.

If the constitutional standards for appellate representation required by **Anders** are to have any meaning for defendants who exercise their right to appeal, the state and lower federal courts must enforce them. To say that a defendant must first show prejudice from their denial begs the question.

The Ohio Court of Appeals concluded that petitioner suffered no prejudice because it had reviewed the record and considered the assignments of error raised in petitioner's co-defendants' appeals. Petitioner submits that it makes a mockery of petitioner's right to counsel on appeal to suggest that it can be vicariously satisfied through co-defendants' counsel's representation. Co-defendants' counsel obviously did not represent petitioner's interests on appeal or present errors on his behalf. Petitioner submits that the right to counsel on appeal is a personal right and can only be satisfied by counsel who represents his interests and files a brief on his behalf.

3. The Need for Review by This Court.

A. This Court Needs To Resolve the Conflict and Confusion In the Lower Courts As To Whether Appellate Counsel's Failure To File a Brief On Direct Appeal Can Be Considered Non-Prejudicial or Harmless Error.

The Ohio Court of Appeals found that appellate counsel's failure to submit a brief on petitioner's behalf on the arguable

claims in the record was non-prejudicial or harmless error. **State v. Penson**, Appendix at A5. The Supreme Court of Ohio upheld the Court of Appeals. As indicated above, the decisions of this Court and most federal circuit courts indicate that prejudice is inherent in this situation. Nevertheless, at least one federal circuit, see **Griffin v. West**, 791 F.2d 1578, has found the failure to file an appellate brief non-prejudicial. Therefore, this Court needs to definitively decide this issue and resolve this conflict and confusion in the lower courts.

B. This Court Needs To Set Current Standards For Judging Counsel's Performance on Appeal.

Additionally, twenty (20) years have passed since the Court's decision in **Anders**. During that period the Court has decided what standards are applicable to claims of ineffective assistance of trial counsel. **See Strickland v. Washington**, 466 U.S. 668 (1984). Since **Anders** the Court has further guaranteed to criminal defendants the right to effective assistance of counsel on appeal. **Evitts v. Lucey**, 469 U.S. 387. However, the Court has not decided what standards should apply for judging the effectiveness of appellate counsel's performance on appeal. This case, involving an **Anders** appeal and virtually no performance by appellate counsel, presents the Court with the opportunity to make a needed decision on this issue, to clarify the **Anders** procedure, and to decide whether prejudice need be shown when there has been a constructive denial of appellate counsel.

C. This Court Has Granted Review On a Related Issue In McCoy v. Wisconsin, Court of Appeals, District I, No. 87-5002, prob. juris. noted, ___ U.S. ___, 98 L.Ed.2d 27 (1987).

This Court has granted review on a related issue involving an **Anders** appeal. **See McCoy v. Wisconsin Court of Appeals, District I**, No. 87-5002, **prob. juris. noted**, ___U.S.___, 98

L.Ed.2d 27 (1987). **McCoy** involves the constitutionality of a Wisconsin rule which requires counsel filing a no-merit brief to discuss why the issue that might arguably support the appeal lacks merit. While the Court will undoubtedly discuss the **Anders** requirements, the **McCoy** case necessarily deals with the constitutionality of a rule applicable only to Wisconsin. On the other hand, petitioner's case presents a more typical **Anders** situation where appellate counsel has failed to file a brief. Thus, a grant of plenary review in petitioner's case will give the Court an opportunity to more fully address the issues that surround a typical **Anders** appeal.

D. The Right To Equal Protection, Due Process, and Effective Assistance of Counsel On Appeal are Fundamental Rights Which Should Be Protected.

Finally, this Court has consistently held that indigent defendants are entitled to counsel on a first appeal, **Douglas v. California**, 372 U.S. 353 (1963), and that counsel must function in the role of an active advocate, as opposed to **amicus curiae. Anders**, 386 U.S. 744; **Evitts**, 469 U.S. at 394. The Court has further guaranteed to indigent defendants a complete and effective review of their convictions. **Entsminger v. Iowa**, 386 U.S. 748, 752 (1967). These constitutional guarantees have a hollow ring for all when our lower courts fail to enforce them. Additionally, when state courts apply harmless error tests to a complete denial of the fundamental rights of equal protection, due process, and effective assistance of counsel, these rights are substantially eroded. This case constitutes an obvious denial of these rights that are basic to our system of appellate review and should not be sanctioned by this Court.

The need for review by this Court is even more compelling because petitioner's case is not an isolated incident. As pointed out above, several Ohio Courts of Appeal do not require appointed counsel to follow the required **Anders** procedures,

effectively vitiating the above constitutional guarantees. Moreover, the Ohio Supreme Court has refused to take corrective action to enforce these minimal due process safeguards. Petitioner and other similarly situated indigent defendants have no place to turn but the federal courts to obtain them. Review by this Court is therefore necessary to halt the erosion of these basic due process rights and restore to them the respect to which they are entitled.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio. Should the Court decide that plenary review is unnecessary in view of the clear conflict between the judgment of the Ohio Supreme Court and this Court's decision in **Anders**, 386 U.S. 738, petitioner alternatively requests that the Court summarily vacate the judgment of the Supreme Court of Ohio and remand the case to that court for further consideration in light of that case. Finally, should the Court initially decide not to grant plenary review or summarily vacate the judgment of the lower court, petitioner requests that the Court defer its decision to grant or deny certiorari pending its decision in **McCoy v. Wisconsin**, No. 87-5002, **prob. juris. noted**, ___ U.S. ___, 98 L.Ed.2d 27 (1987).

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender

GREGORY L. AYERS
Chief Counsel, Counsel of Record

GEORGE A. LYONS
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long Street, 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served on respondent State of Ohio by forwarding a copy to the office of its counsel, Lee C. Falke, Prosecuting Attorney, Montgomery County, Montgomery County Courthouse, 41 N. Perry Street, Dayton, Ohio 45402, by U.S. Mail this 21st day of December, 1987. I further certify that all parties required to be served have been served.

GREGORY L. AYERS
Counsel for Petitioner

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEVEN ANTHONY PENSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

APPENDIX

The Supreme Court of Ohio
Columbus

ON CERTIORARI

1987 TERM

To wit: October 21, 1987

State of Ohio, Appellee,	:	Case No. 87-1341
v.	:	E N T R Y
Steven A. Penson, Appellant.	:	86-261

Upon consideration of the motion for leave to appeal from the Court of Appeals for Montgomery County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 21st day of October, 1987.

MARCIA J. MENGEL CLERK

DEPUTY

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : CASE NO. 9193

STEVEN ANTHONY PENSON : (C.P. #84-CR-1401)

Defendant-Appellant :

.....

O P I N I O N

Rendered on the 5th day of June, 1987

.....

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio,
By: MARK B. ROBINETTE, Assistant Prosecuting Attorney,
Appellate Division, Montgomery County Administration Building,
7th Floor, 451 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DOUGLAS R. SHAEFFER, P.O. Box 593, Dayton, Ohio 45420

STEVEN ANTHONY PENSON, K-3-56, #182582, P.O. Box 45699,
Lucasville, Ohio 45699-0001
Defendant-Appellant

.....

PER CURIAM:

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and

John Albert Smith, Jr. kicked in the front door of the apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Penson on one count of rape, with a firearm specification. On August 14, 1984 defendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification and a specification that defendant had been previously convicted in the State of Ohio of felonious assault.

Defendant was tried jointly with co-defendants Smith and Brooks before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts

Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification; guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; guilty of Gross Sexual Imposition (Count Nine) with a firearm specification; and guilty of having a firearm under a disability (Count twenty-nine).

On December 27, 1984 the trial court filed an entry and order sentencing defendant to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six, not less than twelve (12) years nor more than fifteen (15) years on Counts Five, Six and Eight and not less than Three (3) years nor more than five (5) years on Count Twenty-Nine. On Count Two there is an additional term of three (3) years actual incarceration for the Firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served concurrently with each other; said sentences to be served consecutively with the sentence imposed in 84 CR 1056, an amended entry and order was filed on January 9, 1985 to state

that all sentences pertaining to the rape counts were to be actual incarceration.

Defendant-appellant filed a timely notice of appeal from the judgment and sentence imposed thereon. On June 2, 1986, appellant's counsel filed an Anders brief stating there was no meritorious issues to be considered on appeal. By decision and entry dated June 9, 1986 this court allowed Douglas Shaeffer to withdraw as counsel and granted appellant 30 days to file his own brief. Appellant was granted an extension on June 27, 1986. On July 24, 1986 appellant's request for the loan of the trial transcript was granted and he was given an additional 60 days to complete his brief. Another extension of 60 days was granted by entry dated September 15, 1986. On November 13, 1986 this court overruled appellant's request for the appointment of new counsel and granted appellant 15 more days to use the transcript. A final extension of 25 days was granted in which appellant was to file the brief. No brief was ever filed in the above captioned case.

Pursuant to our duties under Anders v. California (1967), 386 U.S. 738, this court must undertake a full examination of the record to determine whether the defendant was accorded a fair trial and whether any grave or prejudicial errors occurred therein. See also, State v. Toney (1970), 23 Ohio App. 2d 203.

Initially, this court is troubled by the filing of an Anders brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which

could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants' Brooks and Smith's counsel in their respective appeals. Because we have thoroughly examined the record and already considered the assignments of error raised in the other defendants' appeals, we find appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record.

The record of the trial court does support several arguable claims. Our full consideration of each may be examined in the decisions rendered in the companion defendants' appeals. See, State v. John A. Smith (May 13, 1987) Montgomery App. No. 9168, unreported and State v. Richard Brooks (June 4, 1987) Montgomery App. No. 9190, unreported.

In examining the record, we find one issue which requires our attention. The problem involves the trial court's failure to instruct the jury on an element of felonious assault. Appellant was charged in counts five and six with having knowingly caused physical harm to James and Deborah Jones by means of a deadly weapon. The trial court neglected to include the deadly weapon portion of the charge.

However, appellant's counsel failed to object to the charge as given. Absent plain error, the failure to object constitutes a waiver. State v. Underwood (1983), 3 Ohio St. 3d 12. Generally, failure to separately and specifically instruct on every essential element of the crime charged is not per se

plain error. State v. Adams (1980), 62 Ohio St. 3d 151. A reviewing court must examine the record to determine the probable impact of the court's failure to charge an element of the offense and consider whether substantial prejudice may have been visited on the defendant. Id. at 154.

With regard to count five involving James Jones, the state introduced the testimony of several witnesses to demonstrate that he had suffered physical harm as a result of being hit with the gun. James testified that appellant and Steve Penson hit him repeatedly with the pistol about the head and body. (Tr. 208, 211, 212, 214). Deborah Jones testified that she saw James being hit with the gun and that he was bleeding from the head. (Tr. 490, 492). Dr. Terraro testified that James had multiple lacerations on his head and face which required 36 stitches. (Tr. 458). He stated that the injuries were consistent with James' claim that he had been beaten with a gun. (Tr. 458).

The appellant presented no evidence to contradict or refute the testimony inasmuch as the theory of defense presented by all of the defendants was that they were not the persons who committed the acts. In finding appellant guilty on count six, the jury necessarily rejected the proffered defense and believed beyond a reasonable doubt that appellant caused physical harm to James Jones by means of a deadly weapon. We cannot find that, except for the error, the outcome of the jury's decision on this count clearly would

With regard to count six concerning Deborah Jones, the record is devoid of any evidence that she suffered physical harm by means of a deadly weapon. The only two references in the record which lend any support to the felonious assault charge are at pages 489 and 494 of the transcript,

> A. Yes. He had a gun up to my head now and I was sitting on top of the fat one.
>
> OK, well, he came back and then he had the gun to my head and he had his penis in my butt and the other one had his penis in my vagina at the same time and -- (crying)
>
> . . .
>
> Q. Were you face up or face down?
>
> A. No, I was laying sideways cause I could feel the pressure of the gun through the pillow, like in my face.

This evidence alone, as a matter of law, was insufficient to support the finding that appellant committed felonious assault against Ms. Jones. The outcome of the trial may clearly have been different had the court properly charged the jury. Accordingly, we must reverse appellant's conviction and vacate the sentence imposed on count six of the indictment. As modified, the judgment of the trial court is affirmed.

.....

WILSON, J., BROGAN, J., and FAIN, J., concur.

Copies mailed to:

Mark B. Robinette
Douglas R. Shaeffer
Steven Anthony Penson
Hon. W. Erwin Kilpatrick

COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

State of Ohio, Case No. 9193

Appellee,

vs.

Steven Anthony Penson MOTION

Appellant.

* * * *

CERTIFICATION OF MERITLESS APPEAL

Appellant's attorney respectfully certifies to the Court that he has carefully reviewed the within record on appeal, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1056, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1401, and that he will not file a meritless appeal in this matter.

MOTION

Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated effective on the date file-stamped on this Motion.

CERTIFICATION OF SERVICE

On June 2, 1986, I served this document by Ordinary Mail Service upon:

Mr. Ted Millspaugh
Prosecutor's Office
308 Mont. Co. Cts. Bldg.
41 North Perry Street
Dayton OH 45402

Mr. Steven Anthony Penson
K-3-56 #182582
P.O. BOX 45699
Lucasville OH 45699-0001

RESPECTFULLY SUBMITTED

Douglas R. Shaeffer 513/434-7667
Appellant's Attorney
1404 Beaverton Drive Suite 200
Kettering OH 45429

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-830585 TRIAL NO. B-831785
Plaintiff-Appellee,	:	
vs.	:	MEMORANDUM DECISION AND JUDGMENT ENTRY.
ALBERT FREELS,	:	
Defendant-Appellant.	:	

Messrs. Arthur M. Ney, Jr., Seth Tieger, and Ms. Julie K. Wilson, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Albert J. Rodenberg, Jr., 3706 Cheviot Avenue, Cincinnati, Ohio 45211, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the accelerated calendar of this Court pursuant to App. R. 11.1 and Local Rule 12, and was submitted for decision upon the record from the Court of Common Pleas of Hamilton County, Ohio, and the briefs and arguments of counsel.

Counsel for the defendant-appellant, Albert Freels, has reported to this Court that a searching review of the record has revealed to him no errors in the proceedings below prejudicial to the rights of his client upon which any assignment of error may be predicated. Counsel has, therefore, requested this Court to review the record independently to determine whether the proceedings were free from prejudicial error and without infringement of the appellant's constitutional rights.

The record reflects that the appellant was properly charged in a single-count indictment, and that he entered a plea of no contest to the charge of felonious assault, *viz.*, having knowingly caused, or attempted to cause, physical harm to another by means of a deadly weapon, to-wit, a knife. After duly informing the appellant of his rights and accepting the plea, the court ordered that a presentence investigation be made. Thereafter, upon consideration of the report, the court imposed a term of imprisonment in harmony with law. We are convinced that there were no infirmities in the proceedings that led to the acceptance of the plea, and that the sentence fell within the boundaries of the law. It is, therefore, our conclusion that the record of the proceedings below contains no demonstrative evidence of error prejudicial to the appellant's rights.

The conviction from which this appeal is taken is hereby affirmed, and it is, therefore, the Order of this Court that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

KEEFE, P. J., SHANNON and KLUSMEIER, JJ.

The Supreme Court of Ohio

Columbus

63-072

ON COMPUTER

1986 TERM

To wit: January 29, 1986

State of Ohio, Appellee,	:	
	:	Case No. 85-1867
v.	:	E N T R Y
Albert H. Freels, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

Frank D. Celebrezze

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY CLERK

Sara J. Greiner DEPUTY

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-850868 TRIAL NO. B-842193
Plaintiff-Appellee,	:	
vs.	:	MEMORANDUM DECISION AND JUDGMENT ENTRY.
WILLIE McLINDON,	:	
Defendant-Appellant.	:	

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CLERK OF COURTS

Mr. Arthur M. Ney, Jr. and Ms. L. Susan Laker, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Ms. Michele A. Ross, 914 Main Street, Suite 500, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the oral arguments of counsel.

Counsel for defendant-appellant has reported to this Court that a careful review of the record has revealed to her no errors in the proceedings below, prejudicial to the rights of the appel-

lant, upon which any assignment of error may be predicated. Counsel, therefore, has requested this Court to review the record independently to determine whether the proceedings are free from prejudicial error and without infringement of appellant's constitutional rights.

Apparently there are two volumes of the transcript of the proceedings in the trial court in the case *sub judice*. Only one volume, that being volume two, has been filed with this Court. We have therefore examined the record as certified to us and find no error prejudicial to the appellant's rights in the proceedings in the trial court.

It is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

SHANNON, P.J., KEEFE and BLACK, JJ.

The Supreme Court of Ohio
Columbus

1987 TERM

To wit: March 25, 1987

State of Ohio, Appellee, : Case No. 87-19

v. : E N T R Y

Willie C. McLindon, Appellant. :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

FOR YOUR INFORMATION ONLY NOT FOR FILING

Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Robert L. Edington, Acting Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

ROBERT L. EDINGTON ACTING CLERK

J. A. Kelly DEPUTY

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT

BUTLER COUNTY

STATE OF OHIO, Plaintiff-Appellee * CASE NO. CA86-07-099

vs. * MEMORANDUM DECISION AND JUDGMENT ENTRY 12-8-86

PHILLIP P. BIRCHFIELD, Defendant-Appellant *

John F. Holcomb, Butler County Prosecutor, Robin Piper, Assistant Butler County Prosecutor, Butler County Courthouse, Hamilton, Ohio 45011, for Plaintiff-Appellee

Patricia Shanes Oney, 633 Dayton Street, Hamilton, Ohio 45011, for Defendant-Appellant

PER CURIAM. This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Butler County, Ohio, transcript of proceedings, and the brief of appellant, oral argument having been waived.

Counsel for defendant-appellant, Phillip P. Birchfield, has reported to this court that a careful review of the record has revealed to her no errors in the proceedings below prejudicial to the rights of appellant upon which any assignment of error may be predicated. Counsel, therefore, has requested this court to re-

...w the record independently to determine whether the proceedings are free from prejudicial error and without infringement of appellant's constitutional rights. See Anders v. California (1967), 386 U.S. 738, 87 S.Ct. 1396.

We have accordingly examined the record and find no error prejudicial to appellant's rights in the proceedings in the trial court.

It is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Butler County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by her counsel, excepts.

KOEHLER, P.J., JONES and HENDRICKSON, JJ., concur.

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
Plaintiff-Appellee,	)	OPINION.
	)	
Vs.	)	
	)	CASE NO. 82 C.A. 115
LOUIS P. SYKES,	)	
	)	
Defendant-Appellant.	)	

APPEARANCES.

Vincent E. Gilmartin, Prosecuting Attorney, Mahoning County Courthouse, Youngstown, Ohio 44503, for Plaintiff-Appellee.

Donald P. Leone, 24 W. Boardman Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Hon. Joseph E. O'Neill,
Hon. Joseph Donofrio,
Hon. Edward A. Cox, JJ.

Dated: January 26, 1984

DONOFRIO, J.

This appeal arises from a sentencing order dated October 29, 1982, imposing a thirty years to life on one count of an indictment charging defendant-appellant, Louis P. Sykes, with aggravated murder with specifications and a seven to twenty-five years term on the aggravated robbery count of the indictment. Timely notice of appeal was filed on November 5, 1982. On November 22, 1982, new appellate counsel was appointed. On July 8, 1983, counsel filed a no-merit brief contending that a thorough review of the record revealed no arguable prejudicial error which would support an appeal. Thereafter, notice was sent to the appellant to raise any assignments of error which he felt would support his appeal. To date, no response has been received.

Appellate counsel found no prejudicial error and we concur. A review of the record indicates the following procedures were had:

On November 10, 1981, appellant entered a plea of not guilty. Thereafter, certain discovery motions were filed by both the prosecutor and defense counsel. On March 24, 1982, appellant filed a plea of not guilty by reason of insanity. On March 29, 1982, a forensic examination of appellant's sanity was ordered. The requested report from the Forensic Center of District XI was filed on April 15, 1982. That same day, the

appellant filed written waivers of his right to a speedy trial and trial by jury. On April 19, 1982, pursuant to R.C. 2945.06, a three-judge panel was appointed to hear the case. Subsequently, on May 6, 1982, appellant entered a guilty plea to the indictment with specifications as charged. Appellant was found guilty and a pre-sentence investigation and further examination by two psychiatrists was ordered. Following receipt of the requested reports and following testimony on aggravating and mitigating circumstances, on October 29, 1982, sentence was imposed.

The only question present in the above-described proceedings is the absence of the withdrawal of the not guilty by reason of insanity plea. We feel, however, that appellant's later guilty plea clearly indicated his intention to abandon that plea.

The three-judge panel took great pains to inquire into the appellant's history and to the facts surrounding the crimes. Appellant was accorded all his statutory and constitutional rights. Therefore, we must affirm the judgment of the lower court.

Appointed counsel for appellant is permitted to withdraw for the reason that this is a frivolous appeal. State v. Toney (1970), 23 Ohio App. 2d 203.

Judgment affirmed.

O'Neill, P. J., concurs.
Cox, J., concurs.

APPROVED:

JUDGE.

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

ALLEN COUNTY

STATE OF OHIO,	:	CASE NO. 1-86-43
PLAINTIFF-APPELLEE,		
v.	:	J O U R N A L
ROBERT L. POOLE, JR.	:	E N T R Y
DEFENDANT-APPELLANT.	:	

This cause came on for determination on the request of Anthony L. Geiger heretofore designated as appellate counsel for the indigent defendant, Robert L. Poole, Jr., to withdraw as counsel and on counsel's motion for the Court to dismiss the appeal as frivolous, pursuant to the procedure set forth in Anders v. California (1967), 386 U.S. 738, 87 S. Ct. 1396.

Upon consideration the Court find that the said counsel has accompanied his request with a brief finding nothing in the record he considered might arguably support the appeal; that a copy of his request and brief with such references has been furnished to the indigent defendant; that time was allowed the defendant to raise any points that he chooses; that he has failed to file with the Clerk of this Court any legal points which he chooses to raise; that the Court has fully examined all of the proceedings to decide whether the case is wholly frivolous, and finds that no legal points having merit have been raised by counsel or by defendant and the appeal is wholly frivolous; that the request of counsel to withdraw should be allowed and that his motion to dismiss the appeal should be sustained.

It is therefore ORDERED that counsel's request to withdraw as appellate counsel be, and the same hereby is, granted, and ORDERED, ADJUDGED and DECREED that the appeal be, and the same hereby is, dismissed, at the costs of the defendant, appellant herein, for which execution is hereby awarded.

Exceptions saved.

JUDGES

Dated: October 20, 1987
b

STATE OF OHIO

Plaintiff-Appellee

v.

ROBERT L. POOLE, JR.

Defendant-Appellant

CASE NO. 1-86-43

NOTICE REGARDING FRIVOLOUS APPEAL; MOTION TO WITHDRAW; and MOTION FOR EXTENSION

Now comes Anthony L. Geiger, court-appointed counsel for defendant-appellant, Robert L. Poole, Jr., and notifies the court that in his opinion, and pursuant to the standards set forth in Anders v. California, 386 U.S. 738 (1967), there is no merit whatsoever in the appeal of this case and that the appeal is wholly frivolous. Counsel therefore moves the court for an order permitting him to withdraw as attorney for defendant-appellant, and in the alternative, for an extension of time for defendant-appellant to file his brief, if appropriate.

Anthony L. Geiger of
Siferd & Siferd
210 Colonial Building
Lima, Ohio 45801
(419) 222-5045

Attorney for Defendant-Appellant

MEMORANDUM

After careful review of the entire record in this case, discussion with defendant-appellant and his family members, and

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legal research, counsel is of the opinion there is no merit to this appeal.

It is counsel's opinion that nothing appears of record that might arguably support the appeal. Further, it is counsel's opinion that there is no arguable basis for appeal.

Wherefore, counsel respectfully requests the court to:

1. Furnish the defendant-appellant with a copy of this document, and allow him time to raise any points that he chooses;

2. Determine whether this case is frivolous; and, if so, that counsel be permitted to withdraw, and the court dispose of the case as the law may require. If the court finds this case is not frivolous then counsel requests the court to appoint other defense counsel to argue the appeal; and

3. Extend the time for defendant-appellant to file his brief, if appropriate, for a period which the court deems proper.

Respectfully submitted,

Anthony L. Geiger of
Siferd & Siferd
210 Colonial Building
Lima, Ohio 45801
(419) 222-5045
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the Office of the Prosecuting Attorney, 217 N. Main St., Lima, Ohio 45801, by regular U.S. mail / hand delivery this 26 day of March, 1987.

Anthony L. Geiger

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT LAWS, :
Petitioner, : NO: C-1-78-64
vs. :
ARNOLD JAGO, : MEMO; ORDER GRANTING PETITION
Respondent. : FOR WRIT OF HABEAS CORPUS

This is an action based upon an amended petition for writ of habeas corpus, 28 U.S.C. §§ 2241, et seq. In petitioner's first petition he advanced these two grounds:

1) That he was denied the effective assistance of counsel at trial; and

2) That he was denied the effective assistance of counsel on appeal as a result of his appellate counsel's improper withdrawal under the standards set forth in Anders v. California, 386 U.S. 738 (1967).

Petitioner is represented by counsel on this habeas corpus petition.

The Court examined the petition and found that it did not supply sufficient factual allegations to support the grounds petitioner raised. Accordingly, petitioner was granted leave to supply a supplemental petition setting forth more specific factual allegations. Petitioner has filed an amended petition (doc. 13). Respondent has likewise filed a second return of writ (doc. 14). Petitioner has accompanied his new petition with a brief.

At page 2 of that brief it is stated that . . .

> ". . .(i)n the original petition for habeas corpus the petitioner alleges that his counsel was ineffective because they did not subpoena certain records and witnesses that would have established an effective alibi. Possibly because of the passage of time, counsel for petitioner has not by this time been able to locate such records and witnesses. Therefore, this discussion shall be confined to the extremely important denial of the assistance of counsel at the appellate stage."

Thus, apparently petitioner has abandoned the first of his original two grounds (the ineffective trial counsel ground) and pursues only the second one (the Anders ground).

I

Petitioner was convicted of murder in the first degree (former § 2901.01, Ohio Rev. Code) in the Court of Common Pleas of Franklin County, Ohio, in November of 1972. His attorney thereupon filed a notice of appeal in the Franklin County Court of Appeals. Petitioner's attorney then filed a brief and served it both on petitioner himself and on the prosecutor. At page 3 of the brief, petitioner's attorney wrote that:

> ". . .(t)his writer has carefully reviewed this case, including an exhaustive study of the Transcript of Proceedings, and has reached the conclusion that Defendant-Appellant has no legal ground for appeal in this case. This writer requested of Defendant-Appellant his written reasons why an appeal has legal merit in this case, but has received no response from Defendant-Appellant to this request. The only response received was a letter from one Kelly Chapman, who represents himself to be a "legal advisor" for the Southern Ohio Correctional Facility at Lucasville, Ohio."

In that letter Chapman told petitioner's attorney that petitioner "knows nothing relevant to legal matters." Chapman asked the attorney to file timely appeal notices and obtain a transcript and a continuance. This letter contains no particular assignments of error.

Petitioner's attorney,in the brief, cited Anders v. California, supra, and requested leave to withdraw.

The Franklin County Court of Appeals "carefully reviewed the record, including the transcript of evidence." State v. Laws, No. 72AP-404 (5/8/73), Decision, slip op., at 5.

The Court of Appeals stated that it had rarely seen a so "error-free" trial. Even if it had found error, the Court wrote, the error would have been harmless because of the overwhelming uncontradicted evidence. State v. Laws, supra, at 5-6.

The Court of Appeals went on to say that it was not error for the trial court to deny petitioner's last-minute motion for a continuance of the trial so that he could retain new counsel. Ibid., at 6-7. The Court found from the record that petitioner's counsel "overlooked no opportunity to protect his rights." Ibid., at 7. Finally, the Court said that it found

> ". . . no error apparent from the record in connection with the impaneling of the jury, the admission or exclusion of evidence, the argument of counsel, or the charge of the trial court. The charge clearly and fairly set forth for the jury the law to be applied.
>
> "Accordingly, after a careful consideration of the record, we find that defendant received a fair trial and that the record reveals no error prejudicial to defendant. The appeal is fully and completely frivolous.
>
> "For the foregoing reasons, the request of appointed counsel to withdraw is sustained, and the judgment of the Court of Common Pleas is affirmed."

Ibid., at 8.

Petitioner pursued his appeal pro se to the Ohio Supreme Court assigning the following errors:

> "1. It was a denial of defendant-appellant's right to counsel on appeals where appointed appellate counsel filed motions to withdraw under Anders v. California, 386 U.S. 738 (1967),

and such motions were granted although appellate counsel failed to adhere to the requirements which must be met under the Anders rule.

"2. Where Ohio failed to provide adequate legal assistance to inmates attempting to file legal pleadings the Court below erred by refusing to acknowledge the pleadings and assistance given this appellant by a fellow inmate "jail-house" lawyer.

"3. The defendant-appellant was denied due process of law in violation of the Fourteenth Amendment for any and all errors apparent upon the face of the record and contained therein."

Memorandum in Support of Motion to Consolidate Appeals, State v. Laws, Case No. 73-505 (6/19/73), at 2. Petitioner's motion for leave to appeal from the Court of Appeals was denied on September 28, 1973, by the Ohio Supreme Court. The Court also sua sponte dismissed the appeal "for the reason that no substantial constitutional question exists herein."

Petitioner filed a petition to vacate the sentence and set aside the judgment of conviction, in the Franklin County Court of Common Pleas, on or about November 21, 1975. Laws v. State, Case No. 72 CR 03543 A. Petitioner argued that he was denied the effective assistance of counsel and requested a hearing. Petitioner cited therein about nine examples of the alleged denial of assistance of counsel. On February 27, 1976, the trial court determined that there were no substantive grounds for relief and dismissed the petition. State v. Laws, supra, Decision. Petitioner appealed that dismissal to the Franklin County Court of Appeals on the ground that the trial court should not have denied the petition without first holding an evidentiary hearing. The Court of Appeals affirmed State v. Laws, No. 76AP-215 (8/24/76), Decision. Petitioner sought leave to appeal to the Supreme Court but it was denied. State v. Laws, No. 76-1217 (1/28/77).

II

The factual background of Anders v. California, supra, the Supreme Court decision relevant to the facts of this case, is as follows:

After studying the record and consulting with Anders, a convicted defendant, counsel appointed by the California District Court of Appeals, concluded that he would not file an appellate brief. He was of the opinion "that there is no merit to the appeal," 386 U.S. at 739, and so advised the Court by letter. The Court denied Anders' request for the appointment of another attorney. So he proceeded to file his own brief pro se. The District Court of Appeals affirmed the conviction.

The Supreme Court found that the California courts had not made a finding that petitioner's appeal was frivolous. Also, the high court could not say that petitioner's counsel

". . . acted in any greater capacity than merely as amicus curiae. . . . Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity."

386 U.S. at 743. The Court held that the failure to grant Anders, an indigent, the services on appeal of an advocate, rather than an amicus curiae, violated his constitutional rights to "substantial equality and fair procedure." 386 U.S. at 744.

The Supreme Court also established the following procedure for a criminal appellate attorney who finds his case to be wholly frivolous and therefore seeks to withdraw. He should advise the Court of his desire to withdraw and ask

permission to withdraw, while at the same time filing a brief "referring to anything in the record that might arguably support the appeal." 386 U.S. at 744. Then the appellate court should examine the record and determine whether the case is wholly frivolous. If it so finds and state law permits, the Court may then allow counsel to withdraw and dismiss the appeal. The Supreme Court stated further that a bare "no-merit" letter without a brief affords neither the client nor the Court any aid. 386 U.S. at 745.[1/]

Some courts have interpreted Anders as establishing a distinction between appeals which are frivolous, from which counsel is permitted to withdraw, and those which are merely without merit, from which counsel is not permitted to withdraw. Note, Withdrawal of Appointed Counsel from Frivolous Indigent Appeals, 49 Ind. L. J. 740, 747 n. 32 (Summer 1974); Hermann, Frivolous Criminal Appeals, 47 N.Y.U. L. Rev. 701, 705-708 (1970); American Bar Association, Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals, at

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1/ The constitutional underpinnings of the rule or procedures announced in Anders are not entirely clear, however. The Supreme Court does not seem to say that the specific procedures it set forth in Anders are themselves constitutionally required. Schrock and Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117, 1120 n. 24 (1978). The Anders procedure may not amount to a matter of personal constitutional right. Instead, it seems to be a prophylactic measure, in the fashion of the Miranda warnings, designed to ensure respect for constitutional rights, such as the effective assistance of counsel on appeal. Ibid.

77 (Approved Draft 1970). It is certainly a "fine distinction," Sanchez v. State, 85 Nev. 95, 98, 450 P. 2d 793, 795 (1969), and some courts have rejected the distinction between frivolity and lack of merit. Note, Withdrawal of Appointed Counsel, supra.

In Suggs v. United States, 391 F. 2d 971 (D.C. Cir. 1968), appointed counsel filed with the circuit court of appeals and sent to the prosecution a brief and motion to withdraw "whose manifest thrust," according to the Court, was to show that there was "no substance" to any of appellant's pro se specifications of alleged error. 391 F. 2d at 972. The prosecution in effect adopted the brief. A 2-1 majority, by Judge Leventhal, viewed the brief filed by appellant's counsel as an impermissible "brief against the client" and strongly disapproved of the practice of sending a copy to the prosecution:

> "Appointed counsel is of course not required to accept a client's view by asserting points his good conscience would reject even at the loss of a handsome fee. At the same time counsel cannot file a brief against his client. It is one thing for a prisoner to be told that appointed counsel sees no way to help him, and quite another for him to feel sandbagged when the counsel appointed by one arm of the Government seems to be helping another to seal his doom."

391 F. 2d at 974.

> " * * * [I]f the Government had sought a summary disposition by motion for affirmance, it would have had the burden of showing that there was nothing in this case that could conceivably present a non-frivolous question. Now that burden has been shouldered by the lawyer appointed by this Court to represent appellant. It is perhaps not unreasonable to suppose that if this course were approved

> as a precedent it would so embitter the indigent defendants involved as to undercut any possible rehabilitative objective of detention."

391 F. 2d at 975.

While other courts besides the Suggs court have held that a brief accompanying a motion to withdraw which argues that there is no substance to the appeal does not satisfy Anders, e.g.; United States v. Johnson, 527 F. 2d 1328 (5th Cir. 1976); Smith v. United States, 384 F. 2d 649 (8th Cir. 1967), still others have not objected to a brief in this form. E.g., United States v. Camodeo, 383 F. 2d 770 (2d Cir. 1967); People v. Jones, 38 Ill. 2d 384, 231 N.E. 2d 390 (1967). In Jones, however, appointed counsel also listed the points the client wanted to raise. And in Camodeo, counsel also set forth the legal contentions that could be based on the record.

Anders-type claims have been treated by the federal courts by way of habeas corpus. E.g., Hutchinson v. Craven, 415 F. 2d 278 (9th Cir. 1969); Harders v. State of California, 373 F. 2d 839 (9th Cir. 1967).

In Benoit v. Wingo, 423 F. 2d 880 (6th Cir.), cert. denied, 400 U.S. 852 (1970), a habeas corpus petitioner's court-appointed counsel had filed a timely notice of appeal and secured an extension of time for the perfection of the appeal. However after some research on the case he wrote petitioner that he would not be proceeding on the appeal because he did not consider it meritorious; instead, he considered the appeal a "waste of time." 423 F. 2d at 882. Petitioner sought relief in the trial court by moving to vacate the conviction. But this motion was denied by the trial court. The state appellate court affirmed that denial on the ground that petitioner's motion did not demonstrate that he had asked his counsel to proceed with the appeal.

The Sixth Circuit felt however, in reviewing the U.S. District Court's denial of habeas relief, that once the notice of appeal was filed it made no difference whether petitioner had asked his counsel to proceed with the process of appeal. Petitioner "had a right to rest with the assurance that his appeal was being processed." 423 F. 2d at 883. The Circuit Court concluded that, the appeal having been begun, petitioner was not afforded the effective assistance of counsel to prosecute it. Therefore, the Court remanded the case with instructions that the State be given an opportunity to provide petitioner with a review of his conviction on direct appeal, with the benefit of counsel, as if counsel had pursued the appeal in the first instance.

III

In the present case, the Ohio Court of Appeals for Franklin County found that petitioner Laws' appeal was "fully and completely frivolous." State v. Laws, No. 72AP-398 (4/24/73) slip. op., at 6. However, in this Court's judgment, petitioner's court-appointed counsel did not act "in any greater capacity than merely as amicus curiae." Anders v. California, 386 U.S. at 743. Thus, petitioner did not receive "that full consideration and resolution of that matter as is obtained when counsel is acting in that capacity." Anders, supra. His counsel submitted a brief which did not attempt to outline any possible legal issues or give the Court of Appeals any guidance to conduct its review of petitioner's conviction to see if the appeal was in fact completely frivolous, as the Court is required by Anders to do. Thus, petitioner was effectively without counsel on his appeal. The failure even to mention any arguable legal issues, whether or not they might eventually justify a reversal of the conviction,

is in this Court's judgment a violation of Anders. Appellate counsel's task is to advocate, not to judge, his client's case.

In Anders, the Supreme Court made it clear that any procedure which employs conclusory "no-merit letters" as a means of permitting legal counsel to withdraw from the appeal is contrary to the sense of duty owed by both the courts and appointed counsel to an indigent defendant seeking appeal of his conviction. This petitioner's appellate counsel did not even refer to any possible issues in his brief, even to explain why they were frivolous. Anders only requires that an attorney seeking permission to withdraw must file "a brief referring to anything in the record that might arguably support the appeal." (Emphasis added.) 386 U.S. at 744. In that way, the Court of Appeals would at least be directed to portions of the record where review is warranted--where the appointed counsel believes an arguable issue might exist even though he may believe there in fact is none.

Petitioner has presented several specific arguable grounds for appeal on the trial record. These include: (1) whether the State proved the trial court's venue; (2) whether petitioner was entitled to an instruction on the uncorroborated testimony of an accomplice; and (3) the admissibility of the testimony of Wylie Bates as to petitioner's prior criminal conduct. Brief in Support of Writ, at 5, attached to Amended Petition for Writ of Habeas Corpus (doc. 13). Petitioner's counsel, however, failed to refer in his "no-merit" brief to anything that might even arguably support an appeal. Therefore, that brief did not comport with the requirements of Anders.

Of course, this Court does not hereby conclude that any

of these grounds merits either habeas relief or an order by an appellate court vacating the conviction. But petitioner has not received "that full consideration and resolution" obtainable when an appellant is pursuing his appeal with the benefit of counsel. Anders, 386 U.S. at 742. None of the above issues were specifically considered by the Franklin County appellate court on petitioner's first, pro se appeal.

It is worth noting that petitioner's appellate counsel served a copy of his "no-merit" brief upon the prosecutor, a practice of which the D. C. Circuit Court of Appeals strongly disapproved, in Suggs v. United States, supra. However, other courts, such as the Second Circuit Court of Appeals, approve of that practice. Hermann, supra, 47 N.Y.U. L. Rev. at 713-14, n. 58.

Respondent argues in his supplemental return of writ that petitioner's appellate counsel complied with the procedural requirements of Anders v. California, supra, even though the brief he prepared did not set forth any arguable appellate issues. Respondent stresses that (1) petitioner's counsel, according to the "no-merit" brief, carefully reviewed petitioner's entire case, and (2) wrote to petitioner requesting no direct response from his client. That letter left petitioner with the task of preparing and submitting an appellate, pro se brief from scratch. Anders is clear that even if counsel finds his case to be wholly frivolous, he should accompany his withdrawal request to the Court with a brief referring to anything in the record that might arguably support the appeal. 386 U.S. at 744. In the present case, the Court

of Appeals decided that petitioner's appeal was frivolous and therefore dismissable without the benefit even of the limited brief required by Anders. The present record does not show that petitioner even filed a pro se brief before the Court of Appeals dismissed his appeal.

Respondent also argues that Anders notwithstanding, none of the issues petitioner raises even now have merit. It is noteworthy, however, that the Supreme Court in Anders did not rest its holding on its view of the merits of petitioner's case.[2/] Respondent's contention that none of petitioner's specific allegations constitute reversible error is beside the point. See Suggs v. United States, 391 F. 2d at 975-976. Furthermore, as discussed above, the Anders opinion distinguishes between completely frivolous appeals and appeals without merit.

This Court is also not persuaded that petitioner's counsel's labelling his appellate court pleading a "brief" makes any difference in terms of Anders. The brief filed on petitioner's behalf is no different from the "no-merit" letter to the Court of Appeals in Anders.

An Ohio court considered the question whether "due process require(s) the marshalling of some argument on behalf of an indigent when competent counsel can discover no error in the record . . .," in State v. Toney, 23 Ohio App. 2d 203, 206 (Mahoning Co. App., 1970). There a notice of appeal was filed on behalf of the convicted defendant. Toney himself went

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2/ Indeed, the dissent in Anders had great difficulty in perceiving an "arguable" issue in that petitioner's appeal. 386 U.S. at 748, fn.

went ahead and filed a pro se brief with assignments of error. After that his counsel filed a brief wherein he stated:

> "The writer has made a diligent search of the bill of exceptions and made a careful research of the law which might 'arguably support appeal,' and we are unable to substantiate any of the defendant's assignments of error."

23 Ohio App. 2d at 205. Following Anders as it read that decision, the Court of Appeals examined Toney's pro se arguments in his brief and agreed with counsel that there were no errors arguably supportable on appeal. The Court found the appeal frivolous and affirmed the conviction. It granted counsel's motion to withdraw and held that Toney received adequate and fair appellate representation.

The Toney case is distinguishable from the present situation in at least this respect. There the appellant had himself at least filed a pro se appellate brief which directed the attention of the Court of Appeals to particular portions of the record, for specific allegations of error. In its opinion the Court of Appeals did not pick out and explicitly consider any of the three issues petitioner now raises on habeas corpus through his new counsel. But if the Toney case is in fact in conflict with the present decision of this Court, the position of the Toney court is rejected.

No evidentiary hearing is necessary. Rule 8(a), Rules Governing § 2254 Proceedings.

The Petition for Writ of Habeas Corpus is granted. The State of Ohio is directed to provide petitioner Laws with an appointed counsel who shall pursue a delayed appeal, or, at the very least, seek leave to file a delayed appeal and file a brief which sets forth any at least arguable grounds for review. See Anders v. California, supra.

Petitioner's appeal should be considered a "direct" rather than "delayed" appeal, just as if petitioner had been vigorously represented in his first appeal.

If petitioner Laws has not been appointed counsel within sixty days of the date of this Order, he shall be released.

SO ORDERED.

United States District Judge

FILED
JOHN D. LYTER, CLERK
MAR 12 9 23 AM '80
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV. CINCINNATI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Indexed
Docketed
Issued
Action
Issue
Card

ROBERT LAWS, Petitioner) NO. C-1-78-64

v.) ORDER GRANTING MOTION TO ALTER OR AMEND JUDGMENT

ARNOLD R. JAGO, SUPT., Respondent)

RECEIVED
MAR 17 1980
CLERK OF COURT

On February 25, 1980 this Court entered a Memorandum Opinion, Order, and Judgment granting petitioner Laws' petition for a writ of habeas corpus (doc. 18, 19). See generally 28 U.S.C. § 2243. Within ten days of the entry of the Judgment and pursuant to Federal Rule of Civil Procedure 59(e), respondent Jago served on petitioner's trial attorney a motion to alter or amend the Judgment (doc. 20). See generally Fed.R.Civ.P. 5(b).

Respondent's motion is well taken, cf. Mitchell v. Salisbury, 443 F.2d 324 (6th Cir. 1971) (per curiam) (altering order of district court in habeas action by replacing state appellate court with state officials), and is GRANTED. The Judgment (doc. 19) is altered to read: "The State of Ohio is directed to . . . . " In all other respects - and particularly insofar as the last sentence of the Judgment pertains to respondent Jago, the Judgment remains unaffected by this Order.

SO ORDERED.

United States Senior District Judge

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also. copy to all the atty's

FILED
JOHN P. LYTER, CLERK
FEB 25 10 45 AM '80
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV. CINCINNATI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT LAWS, Petitioner)
v.)
ARNOLD JAGO, Respondent)

NO. C-1-78-64

JUDGMENT

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The petition for a writ of habeas corpus is granted. See Anders v. California, 386 U.S. 738 (1967) and Benoit v. Wingo, 423 F.2d 880 (6th Cir. 1970); c.d.

Respondent is directed to -

a) Provide petitioner with a meaningful direct appeal with effective assistance of counsel (to initiate appeal to both Ohio appellate courts, if necessary) within a reasonable time;

b) The appeal(s) shall be as adequate and direct as if counsel had ~~persuaded~~ pursued them effectively in the first instances - the delay will not affect the grounds;

c) Petitioner will be afforded counsel and the appeal will be effectively docketed in the first instance in 90 days.

In lieu of compliance with the above, the respondent will release the petitioner and discharge him from custody.

United States Senior District Judge

ORIGINAL

CASE NO. 87-6116

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEVEN ANTHONY PENSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

Office of LEE C. FALKE,
Prosecuting Attorney for
Montgomery County, Ohio
By: TED E. MILLSPAUGH
Assistant Prosecuting Attorney
APPELLATE DIVISION
Montgomery County Administration Building
Post Office Box 972
7th Floor, 451 West Third Street
Dayton, Ohio 45422
(513) 225-4117

COUNSEL OF RECORD FOR RESPONDENT

MARK B. ROBINETTE
Assistant Prosecuting Attorney
APPELLATE DIVISION
Montgomery County Administration Building
Post Office Box 972
7th Floor, 451 West Third Street
Dayton, Ohio 45422
(513) 225-4117

COUNSEL FOR RESPONDENT

RANDALL M. DANA
Ohio Public Defender

GREGORY L. AYERS
Chief Counsel
Counsel of Record

GEORGE A. LYONS
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long Street, 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

COUNSEL FOR PETITIONER

QUESTION PRESENTED:

I. DOES A DEFENDANT WHO CLAIMS THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL HAVE THE BURDEN OF ESTABLISHING HIS CLAIM BY POINTING TO SPECIFIC ERRORS OR OMISSIONS MADE BY HIS APPELLATE COUNSEL WHICH SHOW, IN LIGHT OF ALL THE CIRCUMSTANCES, THAT HIS APPELLATE COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND WHICH ALSO ESTABLISH A REASONABLE PROBABILITY THAT, BUT FOR HIS APPELLATE COUNSEL'S UNPROFESSIONAL ERRORS, HIS CONVICTION WOULD HAVE BEEN REVERSED ON APPEAL?

Respondent submits that this question should be answered in the affirmative.

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SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

STATEMENT OF THE CASE

On August 10, 1984, Petitioner was indicted by the Montgomery County Grand Jury on one (1) count of Rape, pursuant to R.C. 2907.02 (A)(1), with a firearm specification, pursuant to R.C. 2929.71 and 2941.141 (Docket Entry #1). On August 14, 1984, the grand jury indicted Petitioner on twenty (20) additional counts of Rape, each count containing a firearm specification; one (1) count of Aggravated Burglary, pursuant to R.C. 2911.11 (A)(3), with a firearm specification; two (2) counts of Aggravated Robbery, pursuant to R.C. 2911.01 (A)(1), each count containing a firearm specification; two (2) counts of Felonious Assault, pursuant to R.C. 2903.11 (A)(2), each count containing a firearm specification; one (1) count of Felonious Sexual Penetration, pursuant to R.C. 2907.12 (A)(1) and

2923.02, with a firearm specification; and one (1) count of Gross Sexual Imposition, pursuant to R.C. 2907.05 (A)(1), with a firearm specification (Docket Entry #3). On August 21, 1984, the grand jury added prior aggravated felony conviction specifications to each count of Petitioner's previous indictments and further indicted Petitioner on one count of Having Weapons While Under Disability, in violation of R.C. 2923.13 (A)(2), with said count containing a firearm specification and a prior aggravated felony conviction specification (Docket Entry #10). Petitioner was tried jointly with co-defendants John A. Smith, Jr. and Richard Brooks, before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding Petitioner guilty on fourteen counts of Rape (Count One, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification; guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; guilty of Gross Sexual Imposition (Count Nine) with a firearm specification; and guilty of Having Weapons While Under Disability (Count Twenty-Nine) with a firearm specification. Except for Counts Five and Six, each count of which Petitioner was convicted contained a finding that he had previously been convicted of Felonious Assault (Docket Entry #24).

On December 27, 1984, the trial court filed an entry and order sentencing Petitioner to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six; not less than twelve (12) years nor more than fifteen (15) years on counts five, six and eight; and not less than three (3) years nor more than five (5) years on count twenty-nine. On Count Two there is an additional term of three (3) years actual incarceration for the firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served concurrently with each other and all sentences are to be served consecutively with the sentence imposed in Case No. 84-CR-1056. An amended entry and order was filed on January 9, 1985 to state that all sentences pertaining to the rape counts were to be served as actual incarceration. (Docket Entries #28 and #30).

Petitioner timely filed his Notice of Appeal from his judgment and sentence (Docket Entries #31 and #32). Petitioner's appellate counsel filed an Anders brief in the Montgomery County Court of Appeals on June 2, 1986, stating that there were no meritorious issues to be raised on appeal. On June 9, 1986, Douglas Shaeffer was permitted to withdraw as appellate counsel for Petitioner and the Petitioner was allowed 30 days to file his own brief. Although several extensions of time were granted allowing Petitioner additional time to file his brief, no brief was ever filed.

After reviewing and deciding the appeals filed by co-defendants Richard Brooks, unreported, Montgomery App. No. 9190 (June 4, 1987) and John A. Smith, Jr., unreported, Montgomery App. No. 9168 (May 13, 1987), the Montgomery County Court of Appeals, pursuant to its duties under Anders v. California, 386 U.S. 738 (1967), undertook a full examination of the record to determine whether the Petitioner received a fair trial and whether any grave or prejudicial errors occurred during the trial. The Court of Appeals stated in its Opinion that the record did support several arguable claims which were fully considered in the appeals of the co-defendants, Brooks and Smith. State v. Steven Anthony Person, unreported, Montgomery App. No. 9193, (June 5, 1987), Slip Opinion at p. 5. Based upon its review of the record and consideration of the issues raised in the appeals of the co-defendants, the Court of Appeals reversed Petitioner's conviction for Felonious Assault as charged in Count Six of the indictment and affirmed his conviction on the other counts (See Appendix "B" hereto).

Petitioner filed his Notice of Appeal to the Ohio Supreme Court on July 6, 1987. On October 21, 1987, the Ohio Supreme Court filed an Entry dismissing Petitioner's appeal for want of a substantial constitutional question (Appendix "A" hereto).

REASONS WHY THE WRIT
OF CERTIORARI SHOULD NOT BE GRANTED:

I. THE PETITIONER CANNOT ESTABLISH HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHERE HE HAS FAILED TO POINT TO SPECIFIC ERRORS OR OMISSIONS MADE BY HIS APPELLATE COUNSEL WHICH SHOW, IN LIGHT OF ALL THE CIRCUMSTANCES, THAT HIS APPELLATE COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND WHICH ESTABLISH A REASONABLE PROBABILITY THAT, BUT FOR HIS APPELLATE COUNSEL'S UNPROFESSIONAL ERRORS, HIS CONVICTION WOULD HAVE BEEN REVERSED ON APPEAL.

The Petitioner argues that he was denied the effective assistance of counsel on direct appeal because his appellate counsel failed to strictly comply with the requirements set forth by this Honorable Court in Anders v. California, 386 U.S. 738 (1967). Petitioner further argues that his appellate counsel's failure to file a brief constituted a constructive denial of counsel with the result that prejudice need not be shown.

In United States v. Cronic, 466 U.S. 648 (1984), this Honorable Court noted that some situations do exist where prejudice need not be shown by an accused, the most obvious of which being the complete denial of counsel or the denial of counsel at a critical stage of trial. Id., at p. 658-59 and n.25. This Court cited Davis v. Alaska, 415 U.S. 308 (1974), where the accused was denied the right to effective cross-examination, and Powell v. Alabama, 287 U.S. 45 (1932), "a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial," as being representative of situations where prejudice need not be proven by the defendant. Id., at p. 659-61. But this Court also went on to state that "[a]part from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. See Strickland v. Washington, 466 U.S. at 693-696, 104 S.Ct. at 2067-2069." Id., at p. 659-60, n.26 (Emphasis added; citations omitted). This Court also noted that, in the absence of extraordinary circumstances such as those found in the Davis and Powell cases, in its evaluation of ineffective assistance of counsel claims:

> [W]e begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation.

Id., at p. 658 (Emphasis added; citations and footnotes omitted).

Clearly, due process of law entitled the Petitioner to the effective assistance of counsel on a first appeal as of right. Evitts v. Lucy, 469 U.S. 387, 396 (1985). Just as clearly, however, Petitioner was not entitled to compel his court appointed appellate counsel to press nonfrivolous points requested by Petitioner when counsel, as a matter of professional judgment, decided not to press those points. Jones v. Barnes, 463 U.S. 745, 751 (1983). In the instant case Petitioner's court appointed appellate counsel clearly did, according to his Certificate of Meritless Appeal (Appendix C), conduct a careful examination of the record on appeal and found no errors justifying reversal or modification of Petitioner's conviction and sentence. In light of the foregoing, Respondent respectfully submits that it is clear that Petitioner's court appointed appellate counsel did render some representation to Petitioner, and thus the real issue in the instant cause involves the effectiveness of the representation rendered by Petitioner's court appointed appellate counsel, and not whether Petitioner was represented by counsel at all.

In Evitts v. Lucy, supra, this Court noted that the district court's finding that the petitioner received ineffective assistance of counsel on appeal was uncontested by the parties. Thus, this Court found it unnecessary to "decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel." Id. at p. 392. However, in Smith v. Murray, ___ U.S. ___, 106 S. Ct. 2661 (1986), this Court applied the test of Strickland v. Washington, 466 U.S. 668 (1984), to a claim involving the ineffective assistance of appellate counsel. In Smith v. Murray, supra, this Court held that the habeas corpus petitioner had defaulted his underlying constitutional claim as to the admission of a psychiatrist's testimony at the sentencing phase of his capital murder trial since his appellate counsel had not raised the issue on direct appeal as required by Virginia law. This Court stated: "Nor can it seriously be maintained that the

decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)". Smith, supra at p. 2667. This Court then went on to elaborate:

> It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as Strickland v. Washington made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S., at 689, 104 S.Ct., at 2065. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Piles' testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. Id., at 690, 104 S.Ct., at 2066.
>
> Id., at p. 2667.

Thus, Respondent would respectfully submit that the Strickland test for evaluating claims involving the effectiveness of counsel at the trial stage applies equally to claims involving the effectiveness of counsel on a first appeal as of right. In Strickland v. Washington, supra, this Court held that where a convicted defendant claims that his trial counsel's performance was so deficient as to require reversal of his conviction, he must first show that, in light of all the circumstances, counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687-88. In this particular regard, the Court noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. In addition, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 689-94. Thus, under Strickland, the test for ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice, the same as in Ohio under State v. Lytle, 48 Ohio St. 2d 391 (1976).

Under the Strickland test, Petitioner has clearly failed to demonstrate that he was prejudiced by the manner in which his first appeal as of right was handled. Noticeably absent from Petitioner's Petition for a Writ of Certiorari is even an attempt by Petitioner to point to any error in the trial record which, but for

appellate counsel's failure to raise said, would have resulted in a reasonable probability that the outcome of the proceeding (i.e. appeal) would have been otherwise (i.e. Petitioner's conviction would have been reversed). Even assuming for the sake of argument that appointed appellate counsel's failure to strictly comply with the dictates of Anders v. California, supra, amounts to a violation of an essential duty (i.e. deficient performance), Respondent nevertheless posits that Petitioner's failure to demonstrate any resulting prejudice clearly precludes a finding of ineffective assistance of counsel under the prevailing Strickland standard.

CONCLUSION

The proper standard for evaluating the effectiveness of assistance provided by appellate counsel is undeniably the test set forth by this Honorable Court in Strickland v. Washington, 466 U.S. 668 (1984). See: Smith v. Murray, ___U.S.___, 106 S.Ct. 2661 (1986). Under the Strickland test for judging the effectiveness of counsel, the instant Petitioner has clearly failed to meet the prejudice prong. Therefore, Petitioner has not met his burden in demonstrating ineffective assistance of appellate counsel and hence Petitioner has not demonstrated the existence of a constitutional violation under the Sixth and Fourteenth Amendments to the United States Constitution. Thus, this Honorable Court should deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney for
Montgomery County, Ohio

By _____
TED E. MILLSPAUGH
Assistant Prosecuting Attorney
APPELLATE DIVISION
Montgomery County Administration Building
Post Office Box 972
7th Floor, 451 West Third Street
Dayton, Ohio 45422
(513) 225-4117

COUNSEL OF RECORD FOR RESPONDENT

By _____
MARK B. ROBINETTE
Assistant Prosecuting Attorney
APPELLATE DIVISION
Montgomery County Administration Building
Post Office Box 972
7th Floor, 451 West Third Street
Dayton, Ohio 45422
(513) 225-4117

COUNSEL FOR RESPONDENT

APPENDIX:

A) Ohio Supreme Court Entry - State v. Penson, October 21, 1987

B) Ohio Court of Appeals Decision - State v. Penson (1987), unreported, Montgomery County Court of Appeals Case No. 9193

C) Certificate of Meritless Appeal filed by Petitioner's court appointed appellate counsel in the Ohio Court of Appeals

D) Ohio Court of Appeals Decision - State v. Brooks (1987), unreported, Montgomery County Court of Appeals Case No. 9190

E) Ohio Court of Appeals Decision - State v. Smith (1987), unreported, Montgomery County Court of Appeals Case No. 9168

APPENDIX "A"

The Supreme Court of Ohio

Columbus

1987 TERM

To wit: October 21, 1987

State of Ohio, :
Appellee, : Case No. 87-1341

v. : E N T R Y

Steven A. Penson, :
Appellant. :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Montgomery County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 21st day of October, 1987.

MARCIA J. MENGEL CLERK

DEPUTY

APPENDIX "B"

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee :

vs. : CASE NO. 9193

STEVEN ANTHONY PENSON : (C.P. #84-CR-1401)

Defendant-Appellant :

.....

O P I N I O N

Rendered on the 5th day of June, 1987

.....

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio,
By: MARK B. ROBINETTE, Assistant Prosecuting Attorney,
Appellate Division, Montgomery County Administration Building,
7th Floor, 451 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DOUGLAS R. SHAEFFER, P.O. Box 593, Dayton, Ohio 45420

STEVEN ANTHONY PENSON, K-3-56, #182582, P.O. Box 45699,
Lucasville, Ohio 45699-0001
Defendant-Appellant

.....

PER CURIAM:

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and

John Albert Smith, Jr. kicked in the front door of the apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Penson on one count of rape, with a firearm specification. On August 14, 1984 defendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification and a specification that defendant had been previously convicted in the State of Ohio of felonious assault.

Defendant was tried jointly with co-defendants Smith and Brooks before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts

Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification; guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; guilty of Gross Sexual Imposition (Count Nine) with a firearm specification; and guilty of having a firearm under a disability (Count twenty-nine).

On December 27, 1984 the trial court filed an entry and order sentencing defendant to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six, not less than twelve (12) years nor more than fifteen (15) years on Counts Five, Six and Eight and not less than Three (3) years nor more than five (5) years on Count Twenty-Nine. On Count Two there is an additional term of three (3) years actual incarceration for the Firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served concurrently with each other; said sentences to be served consecutively with the sentence imposed in 84 CR 1056, an amended entry and order was filed on January 9, 1985 to state

that all sentences pertaining to the rape counts were to be actual incarceration.

Defendant-appellant filed a timely notice of appeal from the judgment and sentence imposed thereon. On June 2, 1986, appellant's counsel filed an Anders brief stating there was no meritorious issues to be considered on appeal. By decision and entry dated June 9, 1986 this court allowed Douglas Shaeffer to withdraw as counsel and granted appellant 30 days to file his own brief. Appellant was granted an extension on June 27, 1986. On July 24, 1986 appellant's request for the loan of the trial transcript was granted and he was given an additional 60 days to complete his brief. Another extension of 60 days was granted by entry dated September 15, 1986. On November 13, 1986 this court overruled appellant's request for the appointment of new counsel and granted appellant 15 more days to use the transcript. A final extension of 25 days was granted in which appellant was to file the brief. No brief was ever filed in the above captioned case.

Pursuant to our duties under Anders v. California (1967), 386 U.S. 738, this court must undertake a full examination of the record to determine whether the defendant was accorded a fair trial and whether any grave or prejudicial errors occurred therein. See also, State v. Toney (1970), 23 Ohio App. 2d 203.

Initially, this court is troubled by the filing of an Anders brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which

could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants' Brooks and Smith's counsel in their respective appeals. Because we have thoroughly examined the record and already considered the assignments of error raised in the other defendants' appeals, we find appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record.

The record of the trial court does support several arguable claims. Our full consideration of each may be examined in the decisions rendered in the companion defendants' appeals. See, State v. John A. Smith (May 13, 1987) Montgomery App. No. 9168, unreported and State v. Richard Brooks (June 4, 1987) Montgomery App. No. 9190, unreported.

In examining the record, we find one issue which requires our attention. The problem involves the trial court's failure to instruct the jury on an element of felonious assault. Appellant was charged in counts five and six with having knowingly caused physical harm to James and Deborah Jones by means of a deadly weapon. The trial court neglected to include the deadly weapon portion of the charge.

However, appellant's counsel failed to object to the charge as given. Absent plain error, the failure to object constitutes a waiver. State v. Underwood (1983), 3 Ohio St. 3d 12. Generally, failure to separately and specifically instruct on every essential element of the crime charged is not per se

plain error. State v. Adams (1980), 62 Ohio St. 3d 151. A reviewing court must examine the record to determine the probable impact of the court's failure to charge an element of the offense and consider whether substantial prejudice may have been visited on the defendant. Id. at 154.

With regard to count five involving James Jones, the state introduced the testimony of several witnesses to demonstrate that he had suffered physical harm as a result of being hit with the gun. James testified that appellant and Steve Penson hit him repeatedly with the pistol about the head and body. (Tr. 208, 211, 212, 214). Deborah Jones testified that she saw James being hit with the gun and that he was bleeding from the head. (Tr. 490, 492). Dr. Terraro testified that James had multiple lacerations on his head and face which required 36 stitches. (Tr. 458). He stated that the injuries were consistent with James' claim that he had been beaten with a gun. (Tr. 458).

The appellant presented no evidence to contradict or refute the testimony inasmuch as the theory of defense presented by all of the defendants was that they were not the persons who committed the acts. In finding appellant guilty on count six, the jury necessarily rejected the proffered defense and believed beyond a reasonable doubt that appellant caused physical harm to James Jones by means of a deadly weapon. We cannot find that, except for the error, the outcome of the jury's decision on this count clearly would have been otherwise.

With regard to count six concerning Deborah Jones, the record is devoid of any evidence that she suffered physical harm by means of a deadly weapon. The only two references in the record which lend any support to the felonious assault charge are at pages 489 and 494 of the transcript,

> A. Yes. He had a gun up to my head now and I was sitting on top of the fat one.
>
> OK, well, he came back and then he had the gun to my head and he had his penis in my butt and the other one had his penis in my vagina at the same time and -- (crying)
>
> . . .
>
> Q. Were you face up or face down?
>
> A. No, I was laying sideways cause I could feel the pressure of the gun through the pillow, like in my face.

This evidence alone, as a matter of law, was insufficient to support the finding that appellant committed felonious assault against Ms. Jones. The outcome of the trial may clearly have been different had the court properly charged the jury. Accordingly, we must reverse appellant's conviction and vacate the sentence imposed on count six of the indictment. As modified, the judgment of the trial court is affirmed.

.....

WILSON, J., BROGAN, J., and FAIN, J., concur.

Copies mailed to:

Mark B. Robinette
Douglas R. Shaeffer
Steven Anthony Penson
Hon. W. Erwin Kilpatrick

APPENDIX "C"

COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

State of Ohio, Case No. 9190

Appellee,

vs.

Steven Anthony Penson MOTION

Appellant.

* * * * *

CERTIFICATION OF MERITLESS APPEAL

Appellant's attorney respectfully certifies to the Court that he has carefully reviewed the within record on appeal, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1056, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1401, and that he will not file a meritless appeal in this matter.

MOTION

Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated effective on the date file-stamped on this Motion.

CERTIFICATION OF SERVICE

On June 2, 1986, I served this document by Ordinary Mail Service upon:

Mr. Ted Millspaugh
Prosecutor's Office
308 Mont. Co. Cts. Bldg.
41 North Perry Street
Dayton OH 45402

Mr. Steven Anthony Penson
K-3-56 #182582
P.O. BOX 45699
Lucasville OH 45699-0001

RESPECTFULLY SUBMITTED

Douglas R. Shaeffer 513/434-7667
Appellant's Attorney
1404 Beaverton Drive Suite 200
Kettering OH 45429

APPENDIX "D"

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : CASE NO. 9190

RICHARD BROOKS :

Defendant-Appellant :

.....

OPINION

Rendered on the 4th day of June, 1987

.....

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio,
By: MARK B. ROBINETTE, Assistant Prosecuting Attorney,
Appellate Division, Montgomery County Administration Building,
7th Floor, 451 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

D.K. WEHNER of HUNT, SKILKEN & WEHNER, 2040 First National Plaza, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

BROGAN, J.

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and John Albert Smith, Jr. kicked in the front door of the

apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment, including $200 worth of food stamps. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Brooks on one count of rape, with a firearm specification. On August 14, 1984 defendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification.

Defendant was tried jointly with co-defendants Penson and Smith before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification;

guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; and guilty of Gross Sexual Imposition (Count Nine) with a firearm specification. On December 27, 1984, the trial court filed an Entry and Order sentencing defendant to the Chillicothe Correctional Institute for a term of 10 to 25 years on Counts One though Four, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six, to be served concurrently with each other; with an additional term of 3 years actual incarceration on Count Two for the firearm specification; a term of 5 to 15 years on Counts Five and Six to be served concurrently with each other and consecutively with Count Two; a term of 8 to 15 years on Count Eight to be served concurrently with all other counts; and a term of 18 months on Count Nine to be served concurrently with all other counts. All sentences pertaining to the rape offenses were designated as actual incarceration and the 3 year term of actual incarceration for the firearm specification was ordered to be served consecutively with and prior to all other terms of imprisonment.

Defendant-Appellant filed a timely notice of appeal from the judgment and sentence imposed thereon. Appellant asserts six assignments of error on appeal.

I. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING HIS PRETRIAL MOTION FOR SEVERANCE OF DEFENDANTS.

Appellant contends the court erred in failing to grant the motion for separate trials. The motion to sever claimed that the overwhelming evidence against one of the defendants would have a spillover effect and make it impossible for appellant to receive a fair trial.

Revised Code Section 2945.13 provides,

> When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly unless the court, for good cause shown on application therefor by the prosecuting attorney or one or more of said defendants, orders one or more of said defendants to be tried separately.

Crim. R. 14 provides in part,

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.

The burden is upon the applicant seeking a separate trial to show good cause why a separate trial should be granted. State v. Perod (1968), 15 Ohio App. 2d 115. The granting or denial of such separate trial rests within the sound discretion of the trial court. State v. Dingus (1970), 26 Ohio App. 2d 131. Mere hostility between defendants is not enough to necessitate separate trials. State v. Morris (Sept. 29, 1982), Lorain App. No. 3332, unreported. In deciding whether to grant a

severance, the trial judge must balance the possible prejudice to the defendant against the government's interest in judicial economy and must consider ways which the prejudice can be lessened by other means. United States v. Garza (C.A. 5, 1977), 562 F. 2d 1164.

Appellant contends that several factors were pertinent to the issue of severance and clearly demonstrated the resulting prejudice. First co-defendant Penson was charged with having a weapon under disability which necessitated the introduction of evidence against Penson of a prior criminal record of a violent felony which would taint appellant by association; second that co-defendant Penson's fingerprints had been found at the crime scene but appellant's had not; third that one of the complaining witnesses knew co-defendant Penson prior to the crime events as they had served together at the "workhouse", which again implicated Penson as a known criminal; and fourth that one of the three complaining witnesses failed to identify appellant. (Tr. 31).

Appellant cites United States v. Kelley (2d Cir. 1965), 349 F. 2d 720 in support of his argument. In Kelley the court held that it was an abuse of judicial discretion to not grant severance with respect to one co-defendant. However, Kelley is distinguishable because the circumstance involved a lengthy trial where the defendant's name was not even mentioned for more than three months, defendant's illness caused several delays which the jury regarded as malingering, and much of the evidence was applicable solely to the co-defendants.

In contrast, the facts of the present case do not rise to the same level of "spillover" effect which was apparent in Kelley. While there was some evidence introduced which pertained only to Steve Penson, the trial court carefully cautioned the jury concerning the use of such evidence. (Tr. 183-184, 684-685). The Kelley court specifically noted that cautionary instructions to the jury was one of the safeguards against the use of prejudicial evidence to one defendant. Id. at 756-757.

Furthermore, appellant's claim that there was minimal evidence against him is discounted by a review of the record. Much of the evidence presented was applicable to all three defendants and supported appellant's participation in the crimes alleged in the indictment. Although one of the victims could not identify appellant, the other victim's testimony was sufficient to support identification beyond a reasonable doubt.

Appellant's first assignment of error is overruled.

II. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO SYSTEMATICALLY USE PEREMPTORY CHALLENGES TO ELIMINATE BLACK PERSONS FROM THE JURY PANEL IN VIOLATION OF APPELLANT'S RIGHTS TO EQUAL PROTECTION OF LAWS AND TRIAL BY A REPRESENTATIVE JURY.

Appellant contends that the court erred in failing to require the prosecutor to come forward with a race-neutral explanation for challenging black jurors peremptorily. He claims he established a prima facie showing of the systematic exclusion of blacks from the jury.

In the recent United States Supreme Court case of Batson v. Kentucky (1986), 106 S. Ct. 1712, the court reaffirmed that the equal protection clause forbids prosecutors from challenging potential jurors solely on account of their race or on the assumption that black jurors, as a group, will be unable to impartially consider the state's case against a black defendant. The court re-evaluated its position with respect to the requirements of establishing a prima facie showing of discrimination. The court overruled the earlier standard first formulated in Swain v. Alabama (1965), 380 U.S. 202, which required a defendant to demonstrate a systematic pattern of exclusion in a number of cases. The Supreme Court in Batson specifically stated that a defendant may make a prima facie showing of purposeful racial discrimination in the selection of the jury by relying solely on the facts of his case concerning the prosecutor's exercise of peremptory challenges, Id. at 1722-23. Once a prima facie showing of purposeful discrimination has been made, the burden shifts to the State to come forward with a race-neutral explanation for peremptorily challenging black jurors. In order to make out a prima facie case under Batson, (1) Defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges in order to remove from the venire members of defendant's race, (2) Defendant is entitled to rely upon the fact that peremptory challenges constitute a jury selection practice that permits

those to discriminate who are of a mind to discriminate, and (3) Defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude veniremen from the petit jury on account of their race. Id. In determining whether defendant has made the requisite showing the trial court should consider all the relevant factors. Although the court did not fully elaborate on what circumstances are relevant, it did mention that a "pattern" of challenges or statements made during voir dire may be indicative of a discriminatory purpose. Batson, supra at 1723.

The Batson decision was accorded retroactive effect in all state and federal cases pending on direct appeal or not yet final in the Supreme Court's recent decision in Griffith v. Kentucky (U.S. January 13, 1987) 55 U.S.L.W. 4089.

Before reaching the merits of whether appellant established a prima facie case, we must consider the timeliness of appellant's challenge to the make up of the jury.

In Batson, supra, the court considered petitioner's objection to the prosecutor's removal of blacks from the jury timely because it was made before the jury was sworn. See also, State v. Neil (Fla. 1984), 457 So. 2d 481; Commonwealth v. DiMatteo (Mass. App. 1981), 427 N.E. 2d 754; People v. Payne (Ill. 1983), 457 N.E. 2d 1202; People v. Pagel (Cal. Super. 1986), 232 Cal. Rptr. 107.

In the present action, appellant's objection to the prosecutor's use of peremptory challenges was not made until after he expressed his satisfaction with the jury and the jurors were sworn. The transcript reveals the following colloquy,

> THE COURT: Mr. Schwarz, I think we are back to you.
>
> MR. SCHWARZ: We are satisfied with the jury as seated. Thank you.
>
> THE COURT: Mr. Seeberger;
>
> MR. SEEBERGER: We are satisified with the jury as it is.
>
> THE COURT: Thank you. We have a jury, ma'am.
>
> FOLLOWING THE OATH OF THE JURY:
>
> THE COURT: I suspect we should select two alternates but before we do that, anyone in here need a recess. Let's take a short recess.
>
> • • •
>
> IN CHAMBERS:
>
> MR. RAB: On behalf of Defendant Smith, I wish to challenge the venire on the grounds that of all the prospective jurors that we had there were only two blacks on it and they were both seated and both challenged by the prosecutor and thereby denying this defendant representation of his own race on the jury and denying him the right to trial by jury by all of his peers and there has been in my opinion, a systematic exclusion of blacks on the jury.
>
> MR. SCHWARZ: I would join in that motion and add that the jurors who were on the jury list that I had out there were a hundred and one jurors on that list and we have only been through about forty or forty-five of that but I don't know of any other black jurors and there were numerous absences for no reason that I

know of other than they just didn't show up. I don't know the reason for exclusions and that is not within our ability to find out. We would join him in that we feel a person is not getting a fair trial by his appearance.

MR. RAB: I would join him in that.

MR. MONTA: On behalf of Defendant Penson, we would join in the original motion and the amended motion for the record and indicate that the racial make up of the jury is entirely non negroid and the defendants, for the record, are all negroes.

MR. SEEBERGER: Giving racial qualifications, not a color.

MR. DODSWORTH: So are all the victims.

* * *

MR. DODSWORTH: Well, whether or not we preempt one way or another, it has nothing to do with challenge to race. Jurors are selected in the usual way by the jury commission and challenge to the array goes to the jury rather than to the people coming in here. We had many, many people. The courtroom was full according to the document that we have, was well in excess of a hundred who we called. So, unless there is some law that I don't know, some recent development in the law that I am now aware of, I think --

THE COURT: This rule 24(E), last sentence of the first paragraph, a challenge to the array should be made before examining of a jury pursuant to subdivision A and should be tried by the court. The court would overrule the challenge for two reasons, namely, not made before the examination of the jury on the voir dire examination and secondly, we have no evidence of any systematic exclusion.

We find appellant's objection to the prosecutor's use of peremptory challenges to have been untimely, in light of the fact that the jury had been sworn. At that point in the

progression of the trial, it was too late to enable the court to notice and correct any error. At the very latest, the issue should have been raised before the jury was sworn. Moreover, we consider the better approach is to render an objection contemporaneous with the exercise of a peremptory challenge. The requirement of a contemporaneous objection is based upon practical necessity and basic fairness in the operation of a judicial system. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

In light of the foregoing, we need not consider whether appellant established a prima facie case. Appellant's second assignment of error is overruled.

III. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING HIS MOTION AT THE END OF THE STATE'S CASE TO DISMISS THE FIREARM SPECIFICAITON TO THE INDICTMENT AND IN SENTENCING APPELLANT TO A THREE-YEAR TERM OF ACTUAL INCARCERATION WHEN THE STATE FAILED TO PROVE APPELLANT POSSESSED A FIREARM AS DEFINED IN R.C. 2923.11(A) AND (B).

Appellant contends the state produced insufficient evidence to convict him of a firearm specification under R.C. 2929.71(A). He argues the correct standard to be applied is set forth in State v. Boyce (1985), 21 Ohio App. 3d 153.

This court has had occasion to address the precise issue presented in State v. Jinks (May 6, 1986) Greene App. No. 85-CA-10, unreported. In Jinks, we declined to adopt the reasoning set forth in Boyce and instead followed State v.

Vasquez (1984), 18 Ohio App. 3d 92 wherein the court held that there is no good reason to require a higher degree of proof of a "firearm" than the Supreme Court has required for a "deadly weapon." Id. at 94. A jury may infer from the evidence presented that the gun was capable of firing.

In the present action, sufficient evidence was introduced to enable the jury to reasonably infer that appellant used a firearm during the rapes and robbery. There was testimony describing the gun, (Tr. 306-307) and the method and manner of its use by appellant (Tr. 207, 209, 212, 251). The victims also testified as to appellant's threats to blow various parts of their bodies off. (Tr. 251, 209, 212).

The jury could logically infer from the appellant's own actions that the gun was capable of firing. Appellant's third assignment of error is overruled.

IV. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN INSTRUCTING THE JURY ON THE ISSUE OF COMPLICITY WHICH INSTRUCTION INVITED AND URGED THE JURY TO RETURN A GUILTY VERDICT.

Appellant contends that the trial court's instruction on complicity, in effect, directed the jury to return a guilty verdict against one of the defendants and then decide whether either of the other two aided and abetted the principal. The court instructed the jury as follows,

> When you consider each count of the indictment that charges that all three defendants committed it, consider which of the defendants was the actual participant in committing the offense, then consider if each of the other two aided and abetted the actual participant in

> committing the offense, with the same degree of culpability required to commit the offense, that is, with purpose or knowingly. (Tr. 676-677).

Prior to closing arguments, appellant's counsel joined in a specific objection to the aiding and abetting instruction (Tr. 600). The objection was renewed after the jury was charged. (Tr. 695).

Generally, a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. State v. Price (1979), 60 Ohio St. 2d 146, State v. Simms (1983), 9 Ohio App. 3d 302.

While the trial court's instruction deviated slightly from the standard complicity instruction set forth in 4 Ohio Jury Instructions (1987) 339, Section 523.03, we cannot conclude that the instructions, read as a whole, urged the jury to return a guilty verdict. In addition to the complicity charge, the court also gave the standard instructions on the presumption of innocence, reasonable doubt, and separate consideration of the evidence against each defendant. (Tr. 673, 685-87). Furthermore, appellant has failed to demonstrate how the instruction prejudiced him specifically, as opposed to any of the other defendants.

We find no merit to appellant's fourth assignment of error.

V. THE TRIAL COURT ERRED IN ENTERING A JUDGMENT OF CONVICTION ON TWO COUNTS OF FELONIOUS ASSAULT WHEN THE JURY WAS INSTRUCTED ON THE ELEMENTS OF MISDEMEANOR ASSAULT.

Appellant was charged in counts five and six of the indictment with having knowingly caused physical harm to James and Deborah Jones by means of a deadly weapon. R.C. 2903.11(A)(2). Yet, when the court instructed the jury on the elements of felonious assault, it failed to include all the elements of the offense. The instruction at transcript page 683 went as follows,

> Each defendant is charged with two counts of felonious assault, one on James Jones and one on Deborah Jones. Before you can find a defendant guilty of felonious assault, you must find beyond a reasonable doubt that on or about the 4th day of August, 1984, and in Montgomery County, Ohio, the defendant knowingly caused physical harm to James Jones or in the other count, Deborah Jones, or aided or abetted their co-defendant in the commission of either or both offenses.

The court's instruction was clearly erroneous as it included only the elements required to prove simple assault under R.C. 2903.13(A). However, the record reflects that no objection was made to the instruction in accordance with Crim. R. 30. Absent plain error, failure to object to a jury instruction constitutes a waiver of the issue on appeal. State v. Underwood (1983), 3 Ohio St. 3d 12. Plain error is an obvious error which is prejudicial to the accused, although neither objected to nor affirmatively waived, which if allowed to stand, would have a substantial adverse impact on the integrity of and public confidence in judicial proceedings. State v. Stover (1982), 8 Ohio App. 3d 179, State v. Craft (1977), 52 Ohio App. 2d 1. To rise to the level of plain

error, it must appear on the face of the record not only that the error was committed, but that except for the error, the result of the trial clearly would have been otherwise. State v. Bock (1984), 16 Ohio app. 3d 146, State v. Cooperrider (1983), 4 Ohio St. 3d 226.

In State v. Adams (1980), 62 Ohio St. 3d 151, the Supreme Court stated that the failure to separately and specifically instruct the jury on every essential element of the crime charged is not per se plain error. See also, State v. Long (1978), 53 Ohio St. 2d 91. A reviewing court must examine the record to determine the probable impact of the court's failure to charge an element of the offense and consider whether substantial prejudice may have been visited on the defendant. Adams, supra at 154.

With regard to count five involving James Jones, the state introduced the testimony of several witnesses to demonstrate that he had suffered physical harm as a result of being hit with the gun. James testified that appellant and Steve Penson hit him repeatedly with the pistol about the head and body. (Tr. 208, 211, 212, 214). Deborah Jones testified that she saw James being hit with the gun and that he was bleeding from the head. (Tr. 490, 492). Dr. Terraro testified that James had multiple lacerations on his head and face which required 36 stitches. (Tr. 458). He stated that the injuries were consistent with James' claim that he had been beaten with a gun. (Tr. 458).

The appellant presented no evidence to contradict or refute the testimony inasmuch as the theory of defense presented by all of the defendants was that they were not the persons who committed the acts. In finding appellant guilty on count five, the jury necessarily rejected the proffered defense and believed beyond a reasonable doubt that appellant caused physical harm to James Jones by means of a deadly weapon. We cannot find that, except for the error, the outcome of the jury's decision on this count clearly would have been otherwise.

With regard to count six concerning Deborah Jones, the record is devoid of any evidence that she suffered physical harm by means of a deadly weapon. The only two references in the record which lend any support to the felonious assault charge are at pages 489 and 494 of the transcript,

> A. Yes. He had a gun up to my head now and I was sitting on top of the fat one.
>
> OK, well, he came back and then he had the gun to my head and he had his penis in my butt and the other one had his penis in my vagina at the same time and -- (crying)
>
> . . .
>
> Q. Were you face up or face down?
>
> A. No, I was laying sideways cause I could feel the pressure of the gun through the pillow, like in my face.

This evidence alone, as a matter of law, was insufficient to support the finding that appellant committed felonious assault against Ms. Jones. The outcome of the trial may clearly have been different had the court properly charged the

jury. Accordingly, we must reverse appellant's conviction on count six of the indictment. Appellant's assignment of error is overruled in part and sustained in part.

VI. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING OBJECTIONABLE STATEMENTS BY THE PROSECUTOR IN HIS FINAL ARGUMENT AND FAILING TO INSTRUCT THE JURY TO DISREGARD SAME.

Appellant's final argument claims the court erred in allowing the prosecutor to comment on the failure of a criminal defendant to produce a witness at trial.

Initially, the record reflects that the prosecutor's remarks was directed to co-defendant Penson's failure to produce an alibi witness and did not mention appellant. Furthermore, appellant's counsel did not make any objection to the statement.

Notwithstanding our above concerns, this court recently held in State v. Walton (May 11, 1987) Clark App. No. 2241, unreported, that Crim. R. 16(C)(3) was never designed to prohibit fair comment on the absent witness who could fairly be expected to testify for one side or the other. See also, State v. Foster (1982), 8 Ohio App. 3d 338. There is no evidence in the present case that the appellant provided discovery to the state by way of a list of potential witnesses. As such Crim. R. 16(C)(3) was not implicated.

The prosecutor's comment was within the common sense of familiar experiences in the every day life and was not

forbidden by any law as the proper subject of comment. See, State v. Champion (1924), 109 Ohio St. 281, 289-90. We do not find that the prosecutor's remarks were prejudicial. Appellant's sixth assignment of error is overruled.

In light of the foregoing, we hereby vacate the judgment and sentence imposed on count six. The remainder of appellant's arguments are not well taken. In accordance with App. R. 12(B), the judgment of the trial court is affirmed, as modified.

.....

WILSON, J., concurs.

FAIN, J., dissenting in part and concurring in part:

With respect to the fourth assignment of error, I dissent. I would sustain the fourth assignment of error.

The instruction objected to is as follows:

> When you consider each count of the indictment that charges that all three defendants committed it, consider which of the defendants was the actual participant in committing the offense, then consider if each of the other two aided and abetted the actual participant in committing the offense, with the same degree of culpability required to commit the offense, that is, with purpose or knowingly. (Tr. 676-677, emphasis added.)

Counsel interposed a timely objection to this instruction, including as grounds for the objection that it invited a conviction by its language. Tr. 600. The objection was renewed after the jury was fully instructed. Tr. 695.

The emphasized language in the instruction assumes that at least one of the defendants committed the offense.

> *** In criminal trials before juries, the court's participation must be scrupulously limited lest it consciously or unconsciously indicate an opinion on the evidence or on the credibility of a witness to the jury.
>
> Statements made by a trial judge during the progress of a trial and within hearing of the jury are of the same effect as though embodied in the charge to the jury, and, where such remarks or questioning may lend themselves to being interpreted as an opinion on the part of the judge as to the credibility of witnesses or of a defendant or an opinion on his part as to the facts of the case, prejudicial error results. State v. Kay (1967), 12 Ohio App. 2d 38, 49.

See, also, State v. Sutton (1968), 7 Ohio App. 2d 178; Zimmerman v. State (1932), 42 Ohio App. 407.

To be sure, the trial court's general instructions to the jury in this case properly covered the respective provinces of the judge and the jury, and the fact that each defendant was entitled to a presumption of innocence. Nevertheless, the susceptibility of a jury to any suggestion by the judge, consciously or unconsciously, as to the guilt of the accused is great, given the respective roles of jury and judge. Accordingly, any instruction that assumes the guilt of the defendants, or at least one of them, runs a serious risk of being perceived by the jury, consciously or unconsciously, as a signal that the judge has concluded that the defendants, or at least one of them, are guilty.

While the evidence in this case was sufficient to sustain the defendant's conviction, his identification by the victims was disputed, and I cannot conclude that the evidence against him was so overwhelming as to cause the suggestion of guilt contained in the instruction to have been harmless.

I would sustain the fourth assignment of error, reverse the defendant's convictions, and remand for a new trial.

With respect to the second assignment of error, I would join in overruling it, but my reasoning differs somewhat from that of my colleagues.

I am not persuaded that an attack upon a prosecutor's use of peremptory challenges, based on Batson v. Kentucky (1986), 106 S. Ct. 1712, should be barred as untimely simply because the prospective jury was sworn following an expression of satisfaction with the jury by defense counsel. Where there is nothing in the record to reflect either any prejudice to the state or the creation of any additional practical difficulties as a result of the prospective jury having been sworn and the brief interval between the defense counsel's expression of satisfaction with the jury and his subsequent Batson attack upon the composition of the jury, I would not deem as waived such an important right as the defendant's right to be tried by a jury from which members of his race have not been purposely

excluded.[1]

In this case, however, the objection to the composition of the jury was based primarily upon the racial composition of the entire array (as containing only two Black persons), as exacerbated by the fact that the only two Black members of the array were peremptorily challenged by the prosecution, leaving an all-White jury. The trial judge in overruling the defendants' objections, characterized them as a challenge to the array. See the portion of the trial transcript quoted at pages 9 and 10 of this Court's opinion. The trial court overruled the challenge to the array upon the grounds that: (i) it was not timely made pursuant to Crim. R. 24(E), and (ii) there was no evidence of systematic exclusion. The trial court's holding that the challenge to the array was not timely in accordance with the Rule was correct in view of the fact that the trial court had proceeded with the voir dire examination of the jury.

The defendant's objection was susceptible of being interpreted as a challenge primarily to the array, fortified by

---

[1] Perhaps a better argument can be made that the defense counsel's failure to object as each peremptory challenge is made should be deemed to constitute a waiver of the defendant's Batson rights in view of the usual practice of excusing a prospective juror from the courthouse just as soon as the prospective juror is the subject of a peremptory challenge, thereby making it at least inconvenient, if not impractical, to recall the prospective juror in the event that a Batson objection is sustained. The difficulty with this approach is that it deprives the defendant of the opportunity to assess, and to argue from the standpoint of, the prosecution s overall pattern and practice in the exercise of peremptory challenges during voir dire.

the fact that the only two Blacks in the array had fallen victim to prosecutorial peremptory challenges. Had the defendant intended his objection to be taken as an objection to the propriety of the prosecution's exercise of its peremptory challenges, separately and independently from his challenge to the array, then, given that the objection was susceptible of a contrary interpretation, the defendant had a duty to let the trial judge know that he had misinterpreted the objection as being directed solely to the array. Since the defendant did not do so, he cannot now be heard to complain that the trial judge misunderstood his objection.

Accordingly, I join in overruling the second assignment of error.

With respect to the first, third, fifth and sixth assignments of error, I concur fully in this Court's opinion.

While I concur in the judgment of this Court to the extent that it vacates the judgment and sentence imposed with respect to count six, I respectfuly dissent from that judgment to the extent that it affirms the other convictions. I would reverse and remand for a new trial.

* * * * * * * * *

Copies mailed to:

Mark B. Robinette
D.K. Wehner
Hon. W. Erwin Kilpatrick

APPENDIX "E"

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee :
vs. : CASE NO. 9168
JOHN A. SMITH, JR. :
Defendant-Appellant :

.....

O P I N I O N

Rendered on the 13th day of May, 1987

.....

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio,
By: MARK B. ROBINETTE, Assistant Prosecuting Attorney,
Appellate Division, Montgomery County Administration Building,
7th Floor, 451 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DENNIS J. GREANEY, 201 E. Dayton-Yellow Springs Road, Fairborn, Ohio 45324
Attorney for Defendant-Appellant

.....

BROGAN, J.

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and John Albert Smith, Jr. kicked in the front door of the

apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Smith on one count of rape, with a firearm specification. On August 14, 1984 defendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification.

Defendant was tried jointly with co-defendants Penson and Brooks before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification;

guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; and guilty of Gross Sexual Imposition (Count Nine) with a firearm specification. On December 27, 1984, the trial court filed an Entry and Order sentencing defendant to the Chillicothe Correctional Institute for a term of 10 to 25 years on Counts One though Four, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six, to be served concurrently with each other; with an additional term of 3 years actual incarceration on Count Two for the firearm specification; a term of 5 to 15 years on Counts Five and Six to be served concurrently with each other and consecutively with Count Two; a term of 8 to 15 years on Count Eight to be served concurrently with all other counts; and a term of 18 months on Count Nine to be served concurrently with all other counts. All sentences pertaining to the rape offenses were designated as actual incarceration and the 3 year term of actual incarceration for the firearm specification was ordered to be served consecutively with and prior to all other terms of imprisonment.

Defendant filed a timely notice of appeal on December 21, 1984. Defendant-appellant asserts three assignments of error on appeal.

Appellant's first assignment of error states,

THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY ON THE POTENTIAL UNRELIABILITY OF EYEWITNESS IDENTIFICATION TESTIMONY WHERE SUCH AN INSTRUCTION WOULD HAVE ASSISTED THE JURY IN DETERMINING THE ESSENTIAL FACTUAL ISSUE IN THE CASE.

Appellant contends the trial court erred in failing to give a special instruction on identification testimony in accordance with U.S. v. Telfaire (C.A.D.C. 1972), 469 F. 2d 552. In a criminal case, if requested special instructions are correct, pertinent, and timely presented, they must be included, at least in substance, in the general charge. Cincinnati v. Epperson (1969), 20 Ohio St. 2d 59.

Crim. R. 30(A) provides:

> (A) Instructions; error; record. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies of such requests shall be furnished to all other parties at the time of making such requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The court need not reduce its instructions to writing.
>
> A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Failure to properly request an instruction in writing results in a waiver of a defendant's right to have such instruction given to the jury. State v. Fanning (1982), 1 Ohio St. 3d 19.

A review of the record in the present action reveals that appellant's trial counsel never requested a Telfaire instruction nor registered any objection with the court's charge to the jury. Appellant has therefore waived any argument with respect to the first assignment of error unless, the failure to give the instruction amounted to plain error.

Plain error is an obvious error which is prejudicial to the accused, although neither objected to nor affirmatively waived, which if allowed to stand, would have a substantial adverse impact on the integrity of and public confidence in judicial proceedings. State v. Stover (1982), 8 Ohio App. 3d 179, State v. Craft (1977), 52 Ohio App. 2d 1. To rise to the level of plain error, it must appear on the face of the record not only that the error was committed, but that except for the error, the result of the trial clearly would have been otherwise. State v. Bock (1984), 16 Ohio App. 3d 146, State v. Cooperrider (1983), 4 Ohio St. 3d 226.

An examination of the record reveals that the facts did not contain many of the infirmities often associated with eyewitness identification. James Jones, who was familiar with Steve Penson, Richard Brooks and John Smith, testified that he was 100% positive tht they were the men in his apartment on August 4, 1984. (Tr. 218-19). Deborah Jones testified that she had known Steve Penson before the incident but, had never seen Brooks or Smith. Yet, she unequivocally identified all three suspects in court. (Tr. 483, 485, 510). Mary Jones was

able to positively identify Smith and Penson in court (Tr. 397).

All of the victims testified that the lighting conditions were adequate and that they had ample opportunity to view the defendants during the course of the rapes and burglaries on August 4, 1984.

There was sufficient evidence presented to enable the jury to determine identity beyond a reasonable doubt. We cannot find that the outcome of the case would clearly have been different, had the court given a Telfaire instruction.

Appellant's first assignment of error is overruled.

Appellant's second assignment of error states that the trial court erred in refusing to grant separate trials for the co-defendants. Appellant's counsel filed a motion for separate trials on October 12, 1984 claiming that a co-defendant had made a statement which implicated appellant and that the multiple counts would confuse the jury.

Revised Code section 2945.13 provides,

> When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly unless the court, for good cause shown on application therefor by the prosecuting attorney or one or more of said defendants, orders one or more of said defendants to be tried separately.

The burden is upon the applicant seeking a separate trial to show good cause why a separate trial should be granted. State v. Perod (1968), 15 Ohio App. 2d 115. The granting or denial of such separate trial rests within the sound discretion of

the trial court. State v. Dingus (1970), 26 Ohio App. 2d 131. Mere hostility between defendants is not enough to necessitate separate trials. State v. Morris (Sept. 29, 1982), Lorain App. No. 3332, unreported.

Appellant contends that because the defendants were charged collectively with 84 counts of criminal activity, the jury couldn't help but be confused over the issues. Appellant claims such confusion clearly resulted in prejudice, although he fails to exemplify specifically what prejudice occurred.

Our review of the record reveals that the trial court acted within the parameters of sound discretion when it overruled the motion for separate trials. Preliminarily, we note that appellant failed to renew his motion to sever at the close of the state's case or at the conclusion of all the evidence. At least one Ohio appellate court has ruled that a failure to renew a motion for severance constitutes a waiver of the issue on appeal. State v. Owens (1975), 51 Ohio App. 2d 132, 146. We however, find it unnecessary to determine this issue because the record does not demonstrate that appellant met his burden of showing good cause why a separate trial should be granted.

Initially we must examine whether this case presents a problem identified in Bruton v. United States (1968), 391 U.S. 123, where the United States Supreme Court held that it was a violation of the right to cross-examine guaranteed by the Confrontation Clause of the Sixth Amendment to introduce at a

joint trial, extra-judicial statements made by a defendant who did not take the stand when these statements incriminated a co-defendant. See also, State v. Moritz (1980), 63 Ohio St. 2d 150. The case at hand is distinguishable from Bruton in several important respects.

Here, all three defendants took the stand and expressly denied any involvement in the crimes. Each claimed he was somewhere else on the night of August 4, 1984. Thus, the blame-shifting which occurred in Bruton, supra did not take place in this case. Also, unlike the defendant in Bruton, appellant here had the opportunity to cross-examine his co-defendant.

Appellant's claim that the jury was unable to segregrate the evidence is additionally belied by our examination of the evidence. The evidence relative to the various charges was direct and uncomplicated. See, State v. Roberts (1980), 62 Ohio St. 2d 170. Furthermore, the jury's ability to evaluate the individual proof on each charge is evidenced by the fact that they acquitted appellant on six counts of the indictment.

Accordingly, we find appellant's second assignment of error is not well taken.

Appellant's third assignment of error claims the trial court erred in failing to suppress identification testimony prior to trial. Appellant's counsel filed a motion to suppress identification testimony on September 19, 1984. A hearing on the motion was held on October 9 and 10, 1984.

However, after the hearing but, before the court rendered a decision regarding the identification testimony, appellant's counsel withdrew the September 19, 1984 motion.

It is a well established principal that an appellate court has no authority to consider claims of error not called to the trial court's attention. See, State v. Mathis (1984), 16 Ohio App. 3d 13. Although appellant brought the matter to the trial court's attention, he subsequently abandoned his claims before the court ruled. Appellant cannot now assert error in the court's actions when he, of his own motion, had withdrawn the issue from the court's consideration. The court, therefore, did not err in overruling the motion. Appellant's third assignment of error is overruled.

In light of the foregoing, appellant's third assignment of error is overruled. The judgment of the trial court is affirmed.

.....

WOLFF, J., and FAIN, J., concur.

Copies mailed to:

Mark B. Robinette
Dennis J. Greaney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief In Opposition To Petition For Writ Of Certiorari To The Ohio Supreme Court, was sent to Counsel of Record for Petitioner by depositing said document in the United States mail with first-class postage prepaid to: Gregory L. Ayers, Ohio Public Defender Commission, Eight East Long Street, 11th Floor, Columbus, Ohio 43266-0587.

TED E. MILLSPAUGH
COUNSEL OF RECORD FOR RESPONDENT

Mark B. Robinette

MARK B. ROBINETTE
COUNSEL FOR RESPONDENT

(4)

No. 87-6116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STEVEN ANTHONY PENSON,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Writ of Certiorari to the Court of Appeals of Montgomery County, Ohio

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JOINT APPENDIX

RANDALL M. DANA
Ohio Public Defender

GREGORY L. AYERS *
Chief Counsel

DAVID C. STEBBINS
Senior Assistant
State Public Defender

GEORGE A. LYONS
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: (614) 466-5394
Counsel for Petitioner

LEE C. FALKE
Prosecuting Attorney
Montgomery County, Ohio
Montgomery Cty. Courts Bldg.
41 N. Perry Street
Suite 300
Dayton, Ohio 45402
Telephone: (513) 225-5757

MARK B. ROBINETTE *
Special Assistant
Prosecuting Attorney
20 E. Tabb Street
Suite 101
Petersburg, Virginia 23803
Telephone: (804) 861-8899
Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED DECEMBER 21, 1987
CERTIORARI GRANTED FEBRUARY 22, 1988

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RELEVANT DOCKET ENTRIES

Montgomery County Court of Common Pleas

August 10, 14, 21, 1984	Indictment filed.
December 7, 1984	Petitioner Penson found guilty by jury of twenty-two counts.
January 8, 1985	Order of appointment of appellate counsel filed.
January 9, 1985	Petitioner Penson sentenced to eighteen (18) to twenty-eight (28) years in prison.
January 17, 1985	Notice of Appeal filed.

Ohio Court of Appeals

June 2, 1986	Appellate counsel's certification that appeal is without merit and motion to withdraw filed.
June 9, 1986	Decision and Entry permitting appellate counsel to withdraw filed.
June 5, 1987	Court's Opinion affirming convictions and sentences as to all counts except count six in the indictment, which is reversed and vacated, filed.
June 15, 1987	Judgment Entry reversing Petitioner Penson's conviction and sentence on count six of indictment, but otherwise affirming judgment of trial court, filed.

Supreme Court of Ohio

October 21, 1987	Judgment Entry overruling Petitioner Penson's motion for leave to appeal and dismissing his appeal on the ground that no substantial constitutional question exists therein filed.

THE STATE OF OHIO, MONTGOMERY COUNTY

THE COURT OF COMMON PLEAS

MAY Terms in the year
Nineteen Hundred and Eighty-four

84-CR-1401

Filed: August 10, 1984

MONTGOMERY COUNTY, SS.

THE GRAND JURORS of the County of Montgomery, in the name, and the authority of the State of Ohio, on their oaths do present and find that JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August in the year one thousand nine hundred and eighty-four in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones not his spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT ONE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT

SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, had on or about their person or under their control a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney
Montgomery County, Ohio

By /s/ Walter D. Smith
Assistant Prosecuting Attorney

THE STATE OF OHIO, MONTGOMERY COUNTY

THE COURT OF COMMON PLEAS

MAY Terms in the year
Nineteen Hundred and Eighty-four

84-CR-1401

Filed: August 14, 1984

MONTGOMERY COUNTY, SS.

SECOND COUNT:

THE GRAND JURORS of the County of Montgomery, in the name, and the authority of the State of Ohio, on their oaths do present and find that JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August in the year one thousand nine hundred and eighty-four in the County of Montgomery, aforesaid, and State of Ohio, by force and with purpose to commit any therein felony offense, did trespass in an occupied structure, to-wit: a residence, located at 1947 Fairport, Apt. #104, Dayton, Ohio, or in a separately secured or separately occupied portion thereof, which structure was the permanent or temporary habitation of a person, and in which at that time a person, to-wit: James Jones was present: contrary to the form of the statute (in violation of Section 2911.11(A)(3) of the Ohio Revised Code)

in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWO:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

THIRD COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, in committing a theft offense as defined in Section 2913.01(K) of the Revised Code, to-wit: a violation of Section 2913.02 of the Revised Code, did have a deadly weapon, to-wit: a handgun, on or about their person or under their control; contrary to the form of the statute (in violation of Section 2911.01(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT THREE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit:

a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

FOURTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, in committing a theft offense as defined in Section 2913.01(K) of the Revised Code, to-wit: a violation of Section 2913.02 of the Revised Code, did have a deadly weapon, to-wit: a handgun, or about their person or under their control; contrary to the form of the statute (in violation of Section 2911.01(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT FOUR:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

FIFTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY

PENSON, on or about 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did knowingly cause physical harm to another, to-wit: James Jones, by means of a deadly weapon, to-wit: a handgun; contrary to the form of the statute (in violation of Section 2903.11(A)(2) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT FIVE:

The Grand Jurors further find and specify that while committing the aforesaid offense. JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SIXTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did knowingly cause physical harm to another, to-wit: Deborah Jones, by means of a deadly weapon, to-wit: a handgun; contrary to the form of the statute (in violation of Section 2903.11(A)(2) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT SIX:

The Grand Jurors further find and specify that while committing the aforesaid offense. JOHN ALBERT

SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SEVENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in County of Montgomery, aforesaid, and State of Ohio, did purposely engage in conduct, to-wit: without the privilege to do so, did insert any instrument, to-wit: the barrel of a handgun into the anal cavity of another, to-wit: James Jones, not their spouse by purposely compelling him to submit by force, which if successful would constitute or result in the offense of Felonious Sexual Penetration, to-wit: a violation of Section 2907.12(A)(1) of the Revised Code; contrary to the form of the statute (in violation of Section 2923.02 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT SEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense. JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

EIGHTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did purposely engage in conduct, to-wit: did engage in sexual conduct with another, to-wit: James Jones, not their spouse, by purposely compelling him to submit by force, which if successful, would constitute or result in the offense of RAPE, to-wit: a violation of Section 2907.02(A)(1) of the Revised Code; contrary to the form of the statute (in violation of Section 2923.02 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT EIGHT:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: by the authority of the State of Ohio, upo ntheir oaths, tion of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

NINTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did have sexual contact with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to

submit by force; contrary to the form of the statute (in violation of Section 2907.05(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT NINE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Re-

vised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

ELEVENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT ELEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWELFTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her

to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWELVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

THIRTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT THIRTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

FOURTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT FOURTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

FIFTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deb-

orah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT FIFTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SIXTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT SIXTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit:

a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SEVENTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT SEVENTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

EIGHTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio,

did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT EIGHTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

NINETEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT NINETEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their

person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTIETH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-FIRST COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in

the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-ONE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-SECOND COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-TWO:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their

person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-THIRD COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-THREE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-FOURTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in

the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-FOUR:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-FIFTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-FIVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and

STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-SIXTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-SIX:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-SEVENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY

PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-SEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-EIGHTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-EIGHT:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT

SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

Respectfully submitted,

LEE C. FALKE
Prosecuting Attorney
Montgomery County, Ohio

By /s/ [Illegible]
Assistant Prosecuting Attorney

THE STATE OF OHIO, MONTGOMERY COUNTY

THE COURT OF COMMON PLEAS

MAY Terms in the year
Nineteen Hundred and Eighty-four

84-CR-1401

Filed: August 21, 1984

MONTGOMERY COUNTY, ss.

THE GRAND JURORS of the County of Montgomery, in the name, and the authority of the State of Ohio, on their oaths do present and find that STEVEN ANTHONY PENSON,

SPECIFICATION TO COUNT ONE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWO:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT THREE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT FOUR:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT FIVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT SIX:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT SEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECFICATION TO COUNT EIGHT:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT NINE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT ELEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWELVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonicus Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT THIRTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT FOURTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT FIFTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT SIXTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT SEVENTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT EIGHTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT NINTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-ONE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-TWO:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of

Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-THREE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-FOUR:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-FIVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-SIX:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of

Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-SEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-EIGHT:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

TWENTY-NINTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did knowingly have a firearm, to wit: a handgun, said defendant having been previously convicted in the State of Ohio of an offense of violence, to-wit: Felonious Assault, on May 13, 1975, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio; contrary to the form of the statute (in violation of Section 2923.13(A)(2) of the Ohio Revised

Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-NINE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had on or about his person or under his control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-NINE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of a felony of violence, to-wit: Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

Respectfully submitted,

LEE C. FALKE
Prosecuting Attorney
Montgomery County, Ohio

By /s/ [Illegible]
Assistant Prosecuting Attorney

IN THE COMMON PLEAS COURT
OF MONTGOMERY COUNTY, OHIO

Case No. 84 CR 1401

STATE OF OHIO,
vs. *Plaintiff,*
STEVEN ANTHONY PENSON,
Defendant.

AMENDED ENTRY AND ORDER

Filed: January 9, 1985

The defendant herein having been convicted of the offenses of Rape (Fourteen Counts)—Count one, Counts ten through seventeen, Counts twenty-two through twenty-six (Firearm Specifications on each count, Aggravated Burglary (Firearm Specification) (Count Two), Aggravated Robbery—Two Counts (Firearm Specification) (Counts three and four), Felonious Assault—Two Counts (Firearm Specification) (Counts five and six), Attempted Rape (Firearm Specification) (Count eight), Gross Sexual Imposition (Firearm Specification) (Count nine) and Having Weapon While Under disability (Firearm Specification) (Count twenty-nine), was on December 21, 1984, brought before the Court;

WHEREFORE, it is the JUDGMENT AND SENTENCE of the Court that the defendant herein be delivered to Chillicothe Correctional Institute, there to be imprisoned and confined for a term of not less than fifteen (15) years nor more than twenty-five (25) years

on counts one through four, ten through seventeen and twenty-two through twenty-six, not less than twelve (12) years nor more than fifteen (15) years on Counts five, six and eight, not less than three (3) years nor more than five (5) years on Counts nine and twenty-nine. On Count Two there is an additional term of THREE (3) YEARS ACTUAL INCARCERATION for the Firearm Specification, which shall be served consecutively with, and prior to, all other term of imprisonment. ALL other sentences are to be served concurrently with each other; said sentences to be served consecutively with the sentence imposed in 84 CR 1056. ALL sentences pertaining to the Rape counts are to be ACTUAL INCARCERATION,

and further, that he pay the costs of this prosecution taxed at $————, upon which execution is hereby awarded. Defendant is to receive ———— days credit for confinement.

The Court did fully explain to defendant his appeallate rights and the defendant informed the Court that he understood said rights.

The defendant is sentenced under Sections 2907.02, 2911.11, 2911.01, 2903.11, 2923.02, 2907.02, 2905.05, 2923.13, 2929.71 and 2941.141, O.R.C. Bond is released.

APPROVED:

/s/ Kilpatrick
JUDGE W. ERWIN KILPATRICK

LEE C. FALKE
Prosecuting Attorney of
Montgomery County, Ohio

By /s/ Terry L. Seeberger
TERRY L. SEEBERGER
Assistant Prosecutor

CC: Michael Monta, 3625 Old Salem Ave., Dayton, OH.

COURT OF APPEALS
FOR MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

Case No. 9193

STATE OF OHIO,
Appellee,

vs.

STEVEN ANTHONY PENSON,
Appellant.

CERTIFICATION OF MERITLESS APPEAL AND MOTION

Filed June 2, 1985

Appellant's attorney respectfully certifies to the Court that he has carefully reviewed the within record on appeal, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1056, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1401, and that he will not file a meritless appeal in this matter.

MOTION

Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate

attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated effective on the date file-stamped on this Motion.

CERTIFICATION OF SERVICE

On June 2, 1986, I served this document by Ordinary Mail Service upon:

Mr. Ted Millspaugh
Prosecutor's Office
308 Mont. Co. Cts. Bldg.
41 North Perry Street
Dayton OH 45402

Mr. Steven Anthony Penson
K-3-56 #182582
P.O. Box 45699
Lucasville OH 45699-0001

Respectfully submitted

DOUGLAS R. SHAEFFER 513/434-7667
Appellant's Attorney
1404 Beaverton Drive Suite 200
Kettering OH 45429

IN THE COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO

(Title Omitted in Printing)

DECISION AND ENTRY

Rendered on the 9th day of June, 1986

PER CURIAM:

This case is before the court on the filing of a motion to withdraw as counsel and a certificate of meritless appeal by counsel. The attorney for the defendant-appellant states that there are no meritorious issues for appeal. Accordingly, Douglas R. Shaeffer is withdrawn as counsel for defendant-appellant Steven Anthony Penson.

Appellant Steven Anthony Penson is hereby granted thirty (30) days from the date of this decision and entry to file an appellate brief, pro se, if desired, in furtherance of his appeal. The case will then proceed according to the appellate rules. This court notes that the transcript of the proceedings has been filed and will at the proper time independently review the record thoroughly to determine whether any error exists requiring reversal or modification of sentence, in consideration of the nature of the charges and length of sentence imposed.

/s/ James A. Brogan
JAMES A. BROGAN
Presiding Judge

/s/ William H. Wolff, Jr.
WILLIAM H. WOLFF, JR.
Judge

IN THE COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO

(Title Omitted in Printing)

OPINION

Rendered on the 5th day of June, 1987

PER CURIAM:

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and John Albert Smith, Jr. kicked in the front door of the apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Penson on one count of rape, with a firearm specification. On August 14, 1984 defendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification and a specification that defendant had been previously convicted in the State of Ohio of felonious assault.

Defendant was tried jointly with co-defendants Smith and Brooks before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification; guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; guilty of Gross Sexual Imposition (Count Nine) with a firearm specification; and guilty of having a firearm under a disability (Count twenty-nine).

On December 27, 1984 the trial court filed an entry and order sentencing defendant to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six, not less than twelve (12) years nor more than fifteen (15) years on Counts Five, Six and Eight and not less than Three (3) years nor more than five (5) years on Count Twenty-Nine. On Count Two there is an additional term of three (3) years actual incarceration for the Firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served

concurrently with each other; said sentences to be served consecutively with the sentence imposed on 84 CR 1056, an amended entry and order was filed on January 9, 1985 to state that all sentences pertaining to the rape counts were to be actual incarceration.

Defendant-appellant filed a timely notice of appeal from the judgment and sentence imposed thereon. On June 2, 1986, appellant's counsel filed an *Anders* brief stating there was no meritorious issues to be considered on appeal. By decision and entry dated June 9, 1986 this court allowed Douglas Shaeffer to withdraw as counsel and granted appellant 30 days to file his own brief. Appellant was granted an extension on June 27, 1986. On July 24, 1986 appellant's request for the loan of the trial transcript was granted and he was given an additional 60 days to complete his brief. Another extension of 60 days was granted by entry dated September 15, 1986. On November 13, 1986 this court overruled appellant's request for the appointment of new counsel and granted appellant 15 more days to use the transcript. A final extension of 25 days was granted in which appellant was to file the brief. No brief was ever filed in the above captioned case.

Pursuant to our duties under *Anders* v. *California* (1967), 386 U.S. 738, this court must undertake a full examination of the record to determine whether the defendant was accorded a fair trial and whether any grave or prejudicial errors occurred therein. *See also, State* v. *Toney* (1970), 23 Ohio App. 2d 203.

Initially, this court is troubled by the filing of an *Anders* brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants' Brooks and Smith's counsel in their respective appeals. Because we have thoroughly examined the

record and already considered the assignments of error raised in the other defendants' appeals, we find appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record.

The record of the trial court does support several arguable claims. Our full consideration of each may be examined in the decisions rendered in the companion defendants' appeals. *See, State* v. *John A. Smith* (May 13, 1987) Montgomery App. No. 9168, unreported and *State* v. *Richard Brooks* (June 4, 1987) Montgomery App. No. 9190, unreported.

In examining the record, we find one issue which requires our attention. The problem involves the trial court's failure to instruct the jury on an element of felonious assault. Appellant was charged in counts five and six with having knowingly caused physical harm to James and Deborah Jones by means of a deadly weapon. The trial court neglected to include the deadly weapon portion of the charge.

However, appellant's counsel failed to object to the charge as given. Absent plain error, the failure to object constitutes a waiver. *State* v. *Underwood* (1983), 3 Ohio St. 3d 12. Generally, failure to separately and specifically instruct on every essential element of the crime charged is not *per se* plain error. *State* v. *Adams* (1980), 62 Ohio St. 3d 151. A reviewing court must examine the record to determine the probable impact of the court's failure to charge an element of the offense and consider whether substantial prejudice may have been visited on the defendant. *Id.* at 154.

With regard to count five involving James Jones, the state introduced the testimony of several witnesses to demonstrate that he had suffered physical harm as a result of being hit with the gun. James testified that appellant and Steve Penson hit him repeatedly with the

pistol about the head and body. (Tr. 208, 211, 212, 214). Deborah Jones testified that she saw James being hit with the gun and that he was bleeding from the head. (Tr. 490, 492). Dr. Terraro testified that James had multiple lacerations on his head and face which required 36 stitches. (Tr. 458). He stated that the injuries were consistent with James' claim that he had been beaten with a gun. (Tr. 458).

The appellant presented no evidence to contradict or refute the testimony inasmuch as the theory of defense presented by all of the defendants was that they were not the persons who committed the acts. In finding appellant guilty on count six, the jury necessarily rejected the proffered defense and believed beyond a reasonable doubt that appellant caused physical harm to James Jones by means of a deadly weapon. We cannot find that, except for the error, the outcome of the jury's decision on this count clearly would have been otherwise.

With regard to count six concerning Deborah Jones, the record is devoid of any evidence that she suffered physical harm by means of a deadly weapon. The only two references in the record which lend any support to the felonious assault charge are at pages 489 and 494 of the transcript,

> A. Yes. He had a gun up to my head now and I was sitting on top of the fat one.
>
> OK, well, he came back and then he had the gun to my head and he had his penis in my butt and the other one had his penis in my vagina at the same time and—(crying)
>
> . . .
>
> Q. Were you face up or face down?
>
> A. No, I was laying sideways cause I could feel the pressure of the gun through the pillow, like in my face.

This evidence alone, as a matter of law, was insufficient to support the finding that appellant committed felonious assault against Ms. Jones. The outcome of the trial may clearly have been different had the court properly charged the jury. Accordingly, we must reverse appellant's conviction and vacate the sentence imposed on count six of the indictment. As modified, the judgment of the trial court is affirmed.

WILSON, J., BROGAN, J., and FAIN, J., concur.

IN THE COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO

(Title Omitted in Printing)

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 5th day of June, 1987, appellant's conviction on count six of the indictment is reversed and the sentence imposed is vacated, and, as modified, the judgment of the trial court is affirmed.

/s/ R. K. Wilson
RICHARD K. WILSON
Judge

/s/ James A. Brogan
JAMES A. BROGAN
Judge

/s/ Mike Fain
MIKE FAIN
Judge

THE SUPREME COURT OF OHIO
COLUMBUS

1987 TERM

To wit: October 21, 1987

Case No. 87-1341

STATE OF OHIO,
Appellee,

v.

STEVEN A. PENSON,
Appellant.

ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Montgomery County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 21st day of October, 1987.

MARCIA J. MENGEL
Clerk

/s/ Rita A. Jackson
Deputy

SUPREME COURT OF THE UNITED STATES

No. 87-6116

STEVEN PENSON,
Petitioner,

v.

OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, MONTGOMERY COUNTY

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 22, 1988

No. 87-6116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STEVEN ANTHONY PENSON, *Petitioner,*

v.

STATE OF OHIO, *Respondent*

On Writ Of Certiorari To The Court Of Appeals Of Montgomery County, Ohio

BRIEF FOR PETITIONER

RANDALL M. DANA
Ohio Public Defender

GREGORY L. AYERS
Chief Counsel
Counsel of Record

DAVID C. STEBBINS
Senior Assistant
State Public Defender

GEORGE A. LYONS
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: (614) 466-5394

Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

I. Can Appellate Counsel's Failure To File A Brief On Direct Appeal Be Considered Non-Prejudicial Or Harmless Error As The Ohio Court Of Appeals Found?

II. When The Ohio Court Of Appeals Determined That There Were Arguable Issues That Could Be Raised On Appeal, Was The Court Required To Afford Petitioner The Assistance Of Counsel Before Reviewing His Case And Affirming His Convictions?

III. Is An Indigent Defendant Denied Equal Protection, Due Process And Effective Assistance Of Counsel On His Direct Appeal When His Counsel Refuses To File A Brief, Withdraws From His Nonfrivolous Appeal, And The Appellate Court Affirms His Convictions Without Affording Him The Assistance Of Counsel, After Reviewing The Record And The Arguable Issues Raised By His Co-Defendants?

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OPINIONS BELOW

The order of the Supreme Court of Ohio [Joint Appendix (hereafter J.A.) 45] overruling Petitioner Penson's motion for leave to appeal and claimed appeal as of right from the judgment of the Court of Appeals of Montgomery County, Ohio is not reported. The opinion of the Court of Appeals of Montgomery County, Ohio (J.A. 38) is not reported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 21, 1987. (J.A. 45). The petition for certiorari was filed within 60 days of that date, on December 21, 1987, and was granted on February 22, 1988. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States which provide, in pertinent part:

SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ***

STATEMENT OF THE CASE

After a jury trial in the Montgomery County, Ohio Court of Common Pleas, petitioner, Steven Anthony Penson, was found guilty of the offenses of rape (14 counts), Ohio Revised Code Annotated (Page) (O.R.C.) § 2907.02(A)(1); aggravated burglary, O.R.C. § 2911.11(A)(3); aggravated robbery (two counts), O.R.C. § 2911.01(A)(1); felonious assault (two counts), O.R.C. § 2903.11(A)(2); attempted rape, O.R.C. § 2923.02; gross sexual imposition, O.R.C. § 2907.05(A)(1); and having a firearm under a disability, O.R.C. § 2923.13(A)(2). Penson was also found guilty of firearm specifications, O.R.C. § 2929.71, attached to each of the above counts. (J.A. 39). On December 27, 1984, Penson was sentenced to a term of imprisonment of eighteen (18) to twenty-eight (28) years. (J.A. 39).

On January 8, 1985, new counsel, Douglas Shaeffer, was appointed to represent Penson on appeal. (J.A. 1). Penson timely appealed the judgment of the Montgomery County Court of Common Pleas to the Montgomery County, Ohio Court of Appeals, Second Appellate District (J.A. 1).

On June 2, 1986,[1] appellate counsel filed a "CERTIFICATION OF MERITLESS APPEAL" and a

[1] This date is incorrectly printed in the Joint Appendix as June 2, 1985. *See* J.A. 35.

motion to withdraw as appellate counsel. (J.A. 35). Counsel represented to the court that he had reviewed the record on appeal, that he had "found no errors requiring reversal, modification, and or vacation" of Penson's convictions or sentences, and that he would not file a "meritless appeal." (J.A. 35). Counsel's motion to withdraw requested the court to relieve him of any further responsibility to prosecute the appeal.[2] (J.A. 35-36). On June 9, 1986, the Court of Appeals granted appellate counsel's motion to withdraw, and granted Penson thirty (30) days to file a *pro se* brief. (J.A. 37). The court subsequently granted several requests by Penson for extensions of time to file a brief and his request to borrow the trial transcript. (J.A. 40). On November 13, 1986, the court denied Penson's request for appointment of new counsel, but granted him fifteen (15) more days to use the transcript. (J.A. 40). Penson was thereafter granted a final twenty-five (25) day extension to file a brief. No brief was ever filed. (J.A. 40).

On June 5, 1987, the Ohio Court of Appeals rendered its Opinion in this case. (J.A. 38). The Court of Appeals indicated that *Anders* v. *California*, 386 U.S. 738 (1967), required it to review the record of the trial court proceedings to determine if Penson received a fair trial and whether any prejudicial error occurred. (J.A. 40). The court stated that it was troubled by counsel's filing of an "*Anders* brief." The court found counsel's claims that there were no errors "which could arguably support the appeal to be highly questionable." (J.A. 40). The court

[2] Counsel's certification and motion also included Penson's appeal in a separate case, No. 84-CR-1056, which bore the same case number on appeal, No. 9193, as the present case, but was separately decided. The Court of Appeals judgment in Case No. 84-CR-1056 is not before this court as it was not appealed to the Ohio Supreme Court.

concluded this because "considerable briefs" were filed by counsel for Penson's co-defendants, Richard Brooks and John Smith, in their respective appeals. (J.A. 40-41). The court further found that "[t]he record of the trial court does support several arguable claims." (J.A. 41).

Nevertheless, the court determined that because it had examined the record and already considered the assignments of error raised in the other defendants' appeals, Penson had "suffered no prejudice in his counsel's failure to give a more conscientious examination of the record." (J.A. 41).

Pursuant to its own review of the record, the Ohio Court of Appeals did address one issue. The court determined that the trial court failed to charge the jury on one of the elements of the crime of felonious assault in counts five and six of the indictment. (J.A. 41). Because trial counsel failed to object, the court reviewed the errors under a plain error standard. The court found plain error only with respect to count six. (J.A. 42-43). Penson's conviction and sentence on count six was reversed. (J.A. 43). Penson's convictions and sentences were otherwise affirmed. (J.A. 43-44).

Penson timely appealed the judgment of the Ohio Court of Appeals to the Supreme Court of Ohio. On October 21, 1987, the Supreme Court dismissed his appeal on the ground that "no substantial constitutional question exist[ed] therein." (J.A. 45). Penson timely filed a petition for writ of certiorari in this Court on December 21, 1987. This Court granted certiorari on February 22, 1988.

SUMMARY OF ARGUMENT

This Court has established "minimum safeguards" to assure an indigent defendant adequate and effective

review of his conviction. *Evitts* v. *Lucey*, 469 U.S. 387, 392 (1985). By far the most significant is the right to counsel. Counsel plays a fundamental and essential role in the appellate review process. *Douglas* v. *California*, 372 U.S. 353 (1963); *Evitts*, 469 U.S. at 392. Without counsel, an appeal is little more than a "meaningless ritual." *Douglas*, 372 U.S. at 358.

When counsel has been denied or has failed to render any assistance on appeal, this Court has consistently required a new appeal. *Douglas*, 372 U.S. at 353; *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Anders* v. *California*, 386 U.S. 738 (1967). These decisions recognize that counsel not only provides substantial benefit to the accused but assists the court in reaching a fair and reliable result. Thus, this Court held in *Anders*, *id.* at 738, that appellate counsel could not withdraw from an appeal simply because counsel concluded that the appeal had no merit. An indigent defendant can be assured a fair appeal and equality with others only if counsel plays the role of an advocate and supports the appeal to the best of his ability. *Id.* at 744. This requires counsel to file a brief on the arguable issues in a nonfrivolous appeal and to identify issues that might support the appeal in one he deems frivolous.

In this case, the Ohio Court of Appeals violated the requirements of *Anders* by permitting counsel to withdraw without filing a brief of any type after counsel summarily stated that there were no reversible errors. (J.A. 40). Moreover, the Ohio Court of Appeals expressly disagreed with counsel and found not only arguable errors, but one reversible error. (J.A. 42). Again violating *Anders*, the Court still refused to provide Penson counsel to argue his appeal despite Penson's request for new counsel. The Court instead considered and decided his appeal

without benefit of counsel, finding that Penson was not prejudiced by his counsel's withdrawal. (J.A. 38). The Court's failure to follow *Anders* and require counsel to file a brief effectively denied Penson counsel on appeal.

This Court's decisions in *Jones* v. *Barnes*, 463 U.S. 745, 749 (1983), and *Evitts*, 469 U.S. at 396-397, reaffirmed the requirement of *Anders* that counsel file a brief in every nonfrivolous appeal. Counsel cannot be an effective advocate on appeal if he does not file a brief. The brief is the primary tool of the appellate advocate. Counsel's citation to the record and legal authorities in a brief helps the court understand the salient facts and critical issues so that it can make a fair and reliable determination of the merits of the appeal. The failure of the court to require this type of written advocacy in a brief is the equivalent of failing to appoint counsel at all.

The *Anders* requirement that an adequate brief be filed has thus been upheld by the Second, Sixth, Seventh, Eighth, Ninth, Eleventh and District of Columbia Circuits without a showing of prejudice. *See, e.g., Jenkins* v. *Coombe*, 821 F.2d 158 (2nd Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 655 (1988); *Cannon* v. *Berry*, 727 F.2d 1020 (11th Cir. 1984). To require indigent defendants to demonstrate prejudice in this situation is to effectively deny them counsel in most cases.

Under the *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *United States* v. *Cronic*, 466 U.S. 648 (1984), standards for ineffective assistance of counsel, prejudice must be presumed when counsel is denied or counsel fails to perform. *Strickland* emphasized that counsel's advocacy plays a vital role that is critical to the ability of the adversarial process to produce just results. *Strickland*, 466 U.S. at 685. Thus, where counsel is denied or

counsel fails to participate in the adversarial process, prejudice is presumed. *Cronic*, 466 U.S. at 659. In an appellate context, if counsel has not filed a brief he is effectively absent from the proceedings. Secondly, counsel's nonperformance undermines the adversarial process on appeal. It simply does not occur. Penson's situation is indistinguishable from that of someone who had no counsel at all. *See Evitts*, 469 U.S. at 395n. 6. Any result must be presumptively unreliable. The Second, Sixth, and Eleventh Circuits agree that counsel's failure to file an adequate brief is presumptively prejudicial under *Strickland* standards. *Cannon*, 727 F.2d 1020; *Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988); *Jenkins*, 821 F.2d 158.

The Ohio Court of Appeals' independent review of the record and consideration of the errors in Penson's co-defendants' appeals did not cure this denial of counsel. Independent review of the record cannot adequately substitute for the assistance counsel provides his client and the court. It is the function of appellate courts to judge, not advocate issues. Even competent counsel sometimes fail to raise meritorious issues. *See Smith* v. *Murray*, 477 U.S. ___, 91 L.Ed.2d 434, 445 (1986).

The right to counsel is a personal right. Penson was entitled to his own independent counsel on appeal just as much as indigent defendants are entitled to their own independent counsel at trial. Where counsel is denied at trial, even though a co-defendant was represented, prejudice is presumed. *Green* v. *Arn*, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, ___ U.S. ___, 98 L.Ed.2d 17 (1987). There is no difference here. Neither counsel for the co-defendants were consciously advocating on Penson's behalf. Penson was simply denied his right to counsel. Prejudice must be presumed as in any other

situation where counsel has been denied to an indigent defendant at any crucial stage of the adversarial process.

The right to counsel on appeal insures the fairness and thus the legitimacy of the appellate adversary process. Because of the fundamental nature of the right to counsel this court has never required a showing of prejudice when counsel is denied. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Unrepresented indigent defendants can no more be expected to demonstrate prejudice from a denial of counsel than they can be expected to pursue their appeals in the first place. Such a requirement would nullify *Anders* and the right to appellate counsel which it protects. *Pennsylvania* v. *Finley*, 481 U.S. ___, 95 L.Ed.2d 539 (1987). Such a rule would burden the state appellate courts by requiring them to review the cold record and speculate as to the outcome of issues without briefing or oral argument, the very cornerstones of appellate advocacy. Indigent defendants correctly will feel that they have been dealt with unfairly.

On the other hand, a rule requiring a presumption of prejudice when counsel is denied is easy to follow. The denial is easy to identify; and because the court is directly responsible, it is easy for the court to prevent. It further accords the appropriate respect for the fundamental right of counsel. It is the only way to guarantee to an indigent defendant an adequate and effective review of his conviction.

ARGUMENT

AN INDIGENT DEFENDANT IS DENIED EQUAL PROTECTION, DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL WHEN HIS COUNSEL REFUSES TO FILE A BRIEF, WITHDRAWS FROM HIS NONFRIVOLOUS APPEAL, AND THE APPELLATE COURT AFFIRMS HIS CONVICTIONS WITHOUT AFFORDING HIM THE ASSISTANCE OF COUNSEL, AFTER REVIEWING THE RECORD AND THE ARGUABLE ISSUES RAISED BY HIS CODEFENDANTS.

I. THE FUNDAMENTAL ROLE OF COUNSEL ON APPEAL.

This Court has recognized that a first appeal of right in a state court is an "integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). A state's procedures for deciding appeals must therefore satisfy the fairness and equality demanded by the Due Process and Equal Protection Clauses of the Constitution.[3] *Evitts*, at 393. *See, e.g.*, *Griffin* v. *Illinois*, 351 U.S. at 18. Certain "minimum safeguards" necessary to assure an adequate and effective appeal for indigent defendants have been established by the Court. *Evitts*, 469 U.S. at 392. By far the most significant is the right to counsel, see *Douglas* v. *California*, 372 U.S. 353 (1963).

Just as the assistance of counsel is essential to a fair trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the right to be represented by counsel on appeal is fundamental and essential to adequate and effective review. *Douglas*, 372

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[3] In Ohio, the right to appeal is established by Article IV § 3 of the Ohio Constitution and Ohio Revised Code Annotated (Page) § 2953.02. *See also* Rule 3, Ohio Rules of Appellate Procedure.

U.S. at 356; *Evitts*, 469 U.S. at 392. Lawyers are "necessities, not luxuries" in our adversarial system of criminal justice. *Gideon*, 372 U.S. at 344. As stated by Justice Schaefer of the Illinois Supreme Court:

> "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."

Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956); *see also United States* v. *Cronic*, 466 U.S. 648, 654 (1984); *Kimmelman* v. *Morrison*, 477 U.S. ___, 91 L.Ed.2d 305, 320 (1986) ("it is through counsel that the accused secures his other rights"). A defendant on appeal seeks to demonstrate that his conviction and loss of liberty is unlawful. *Evitts*, 469 U.S. at 396. To do so he must face an adversary proceeding on appeal that is governed by intricate rules and procedures which are hopelessly forbidding to a layperson. *Id.* Without counsel he is unable to protect the vital interests at stake. *Id.* Thus, absent the "guiding hand of counsel," *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), the right to an appeal is nothing more than a "meaningless ritual." *Douglas*, 372 U.S. at 358; *Evitts*, 469 U.S. at 393-94.

Of course, the right to counsel on appeal "cannot be satisfied by mere formal appointment." *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940); *Evitts*, 469 U.S. at 395. The right is violated if no actual assistance is provided. *Id.* To be constitutionally adequate, appellate counsel must render "effective assistance." *Id.* at 396. A fortiori, when counsel is absent, does not participate, or renders ineffective assistance, there cannot be a constitutionally adequate and effective appeal.

II. THE DECISIONS OF THIS COURT AND THE LOWER COURTS REQUIRE THAT PREJUDICE BE PRESUMED WHEN COUNSEL HAS BEEN DENIED OR FAILS TO RENDER ANY ASSISTANCE ON APPEAL.

Two principles are evident from this Court's decisions pertaining to the right to counsel on appeal. First, where the right has been denied, this Court has consistently ordered a new appeal without requiring the accused to show that he was prejudiced by the denial or would have prevailed on the merits had counsel been provided. *See Douglas*, 372 U.S. at 353; *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Anders* v. *California*, 386 U.S. 738 (1967); *Evitts*, 469 U.S. at 387. Secondly, the Court has repeatedly stated that appellate counsel must play the role of an active advocate, as opposed to *amicus curiae*, to provide the type of assistance required by the Constitution. *Anders*, 386 U.S. at 744; *Jones* v. *Barnes*, 463 U.S. 745, 754 (1983); *Evitts*, 469 U.S. at 394.

In *Douglas* v. *California*, 372 U.S. at 354, the Court reviewed a California case where counsel had been denied an indigent on appeal because the court, after an independent review of the record, concluded that counsel would be of no value to either the defendant or the court. The Court held that "when an indigent is forced to run this gauntlet of a preliminary showing of merit" to obtain counsel, the "right to appeal does not comport with fair procedure." *Id.* at 357. The Court pointed out that federal courts must honor an indigent's request for counsel "regardless of what they think the merits of the case may be; and representation in the role of an advocate is required." *Id.* at 357-58. Finally, the Court found that the California procedure denied an indigent defendant equal protection on an appeal of right because the rich man

> . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of

> arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id. at 358.

The same analysis applies to the case at bar. The Ohio Court of Appeals determined that Penson was not prejudiced by his counsel's failure to file a brief and withdrawal from the case because it had "thoroughly examined the record and already considered the assignments of error raised in the other defendants' appeals." (J.A. 40-41). Thus, the Ohio Court of Appeals denied Penson counsel for essentially the same reason the California court did in *Douglas*—because it found counsel would not have benefited him. As indicated by *Douglas*, this conclusion was constitutionally flawed.

In *Swenson* v. *Bosler*, 386 U.S. at 258, the Court found unconstitutional a Missouri procedure whereby indigent defendants' appeals were decided without the appointment of counsel. The Missouri court considered the issues raised in trial counsel's motion for new trial and any *pro se* briefs filed by the defendant. This Court did not require Bosler to show he was prejudiced by the denial of counsel. The Court reasoned:

> The assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript may well be of substantial benefit to the defendant. This advantage may not be denied to a criminal defendant, solely because of his indigency, on the only appeal which the State affords him as a matter of right.

Id. at 259. This advantage was denied Penson.

In *Anders* v. *California*, 386 U.S. 738 (1967), this Court further articulated minimum standards for representation of indigent defendants on appeal. *Anders* is significant because counsel's action in *Anders* was virtually identical to that of Penson's appellate counsel. After reviewing the record, Anders' counsel simply filed a letter with the Court stating there was "no merit" to the appeal. *Id.* at 739. After Anders filed a *pro se* brief, the appellate court affirmed his conviction. Without deciding whether Anders' appeal had any merit, this Court found *Anders'* counsel's "bare conclusion" inadequate. It smacked of the "treatment that Eskridge received." *Id.* at 742. *Eskridge* v. *Washington State Board*, 357 U.S. 214, 215 (1958) (procedure which permitted trial judge to withhold transcript if he felt the defendant had had a fair trial without prejudicial errors held unconstitutional); *see also Lane* v. *Brown*, 372 U.S. 477 (1963) (procedure which permitted public defender to deprive indigent of transcript if he thought appeal would be unsuccessful held unconstitutional). The *Anders* Court, 386 U.S. at 743, noted that the California courts had not found Anders appeal to be frivolous and counsel's actions were those of an *amicus curiae*.

Because *Anders'* counsel did not play the role of an advocate, his appeal did not receive the "full consideration and resolution" it would have had counsel done so. *Id.* The Court then emphasized that the constitutional requirements of substantial equality and fair process can only be attained

> [w]here counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more

> assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability.

Id. at 744. *See also Ellis* v. *United States*, 356 U.S. 674 (1958). Thus, *Anders* holds that an appointed attorney must advocate his client's case vigorously and may not withdraw from a nonfrivolous appeal. *Jones*, 463 U.S. at 749; *Laffosse* v. *Walters*, 585 F. Supp. 1209, 1213 (S.D.N.Y. 1984); *People* v. *Barton*, 132 A.D.2d 1000, 518 N.Y.S.2d 286 (1987). By way of dictum, the Court did indicate that when counsel believes the appeal is "wholly frivolous," counsel may move to withdraw. Counsel's motion must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Anders*, 386 U.S. at 744.[4] However, it is important to recognize that the court's dictum is inapplicable to this case.

[4] The Court's dictum has generated criticism that the procedure is inconsistent in that it requires the attorney who concludes an appeal is frivolous to file a brief raising errors that arguably support the appeal, or, in other words, to "brief the unbriefable." *See, e.g.*, STANDARDS RELATING TO CRIMINAL APPEALS § 3.2 commentary at 78 (Approved Draft 1970); *Commonwealth* v. *Moffett*, 383 Mass. 201, 205-06, 418 N.E.2d 585, 590 (1981). The confusion, which is evidenced by the state appellate court's action herein, appears to stem from the lower courts' failure to distinguish between an appeal that is wholly frivolous and one that is arguable but lacks merit. The Court need not be detained by this problem, however, because, as will be shown below, Penson's appeal was not frivolous and contained arguable nonfrivolous issues. To the extent the Court feels compelled to address this problem, Penson suggests that a clear definition of what constitutes a "frivolous" appeal would greatly assist in clearing up the confusion. Simply put, the Court could define a frivolous appeal as one containing no issue on which a rational argument on the law or facts can be made, see *Coppedge* v. *United States*, 369 U.S. 438, 448 (1962), and only permit motions to withdraw in those situations. *See Anders*, 386 U.S. at 746, Justice Stewart, dissenting. Of course, the court would be required to conduct an independent review of the record to determine if it agrees with counsel's conclusion as to frivolity, which should be presented in lawyer-like fashion showing counsel's thorough analysis of the issues in the case. *See Anders*, at 744-45. In all other cases, a brief on the merits would be required. It is submitted that this clarification of the *Anders* procedure would better promote the goals of fair and reliable decision-making on appeal and vigorous and effective advocacy that underlies *Anders*. *See Jones*, 463 U.S. at 754. For a more complete discussion of this problem, see the *Amicus Curiae* Brief of the Ohio Association of Criminal Defense Lawyers in support of petitioner at § III.

First, the Ohio Court of Appeals specifically found that Penson's appeal was nonfrivolous by acknowledging the presence of arguable issues. (J.A. 41). Secondly, Penson received the same treatment from his counsel and the state appellate court as Anders did. His counsel should not have been permitted to withdraw. After reviewing the record, Penson's counsel filed a "Certification of Meritless Appeal," see J.A. 35, stating that he found "no errors requiring reversal, modification, and/or vacation" of Penson's convictions or sentences and "that he will not file a meritless appeal" on Penson's behalf. Counsel's certification was accompanied by a motion to withdraw. *See* J.A. 35-36. Counsel's standard for providing representation, which the lower court sanctioned, was actually higher than that of Anders' counsel. Penson's counsel refused to represent him because the appeal was not a clear winner and not simply because it lacked merit. Without determining that Penson's appeal was frivolous, or requesting a brief, the Ohio Court of Appeals granted counsel's motion to withdraw a week after it was filed. (J.A. 37). The Court indicated it would independently review the record for reversible error at a later time. *Id.* The Court subse-

quently denied Penson's request for appointment of another attorney. (J.A. 40).

The Ohio Court of Appeals thereafter found that it was troubled by counsel's filing of an "*Anders* brief"[5]; that counsel's conclusion that there were no errors which could arguably support the appeal was "highly questionable" due to the "considerable briefs" filed by Penson's co-defendants; and that the record did support several arguable claims. (J.A. 41). Indeed, the Court reversed one of Penson's convictions. (J.A. 41-42). Therefore, the Court specifically found the appeal was meritorious and improperly permitted Penson's counsel to withdraw in violation of *Anders*.

Even assuming Penson's counsel had stated that the appeal was frivolous, *Anders* still required him to file a brief. The no merit letter "affords neither the client nor the court any aid." *Anders*, 386 U.S. at 745.

> "The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate."

Id. at 745. Unless counsel properly performs as an advocate there cannot be an adequate and effective review of the accused's conviction. Counsel's role as an advocate requires, at a minimum, that counsel review the record and submit a thorough, lawyer-like brief that reflects his conscientious examination of the facts and law in the case. *Nell* v. *James*, 811 F.2d 100, 104 (2nd Cir. 1987). *Nickols* v.

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[5] The Ohio Court of Appeals characterization of counsel's filing as an "*Anders* brief" is inaccurate. Counsel's "certification of meritless appeal" was nothing more than a "no-merit" letter which was condemned in *Anders*.

Gagnon, 454 F.2d 467, 471 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972).

Moreover, *Anders* requires that counsel be appointed once the court determines there are arguable issues:

> ". . . if [the court] finds any of the legal points arguable on their merits [and therefore not frivolous] it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal."

Anders, 386 U.S. 744. *Accord Nell*, 811 F.2d at 103; *State* v. *Causey*, 503 So.2d 321 (Fla. 1987); *People* v. *Wende*, 25 Cal.3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979). The Ohio Court of Appeals did not appoint counsel for Penson.

The Ohio Court of Appeals further violated *Anders* by finding Penson was not prejudiced by counsel's nonperformance. (J.A. 40-41). *Anders* does not require a specific showing of prejudice when counsel files a no-merit letter. In fact, the *Anders* Court ordered a new appeal despite the dissent's contention that there was no arguable issue to present. *See Anders*, 386 U.S. at 746, Justice Stewart, dissenting. Permitting the court of appeals to deny counsel under a "no prejudice" standard is similar to allowing the trial court to deny counsel because the defendant would have been found guilty anyway. The United States Constitution requires more.

Justice (then Judge) Stevens in *Nickols* v. *Gagnon*, 454 F.2d at 470, captured the essence of why a no-merit letter procedure like that used in Penson's case is not constitutionally adequate:

> Anders forcefully argued that the conclusory no merit letter which his lawyer had prepared provided the Court with no assistance whatsoever in making its review of the record, and of particular significance, no assurance that the lawyer had, in fact,

> discharged his obligation to his client in a competent and professional manner. The danger that a busy or inexperienced lawyer might opt in favor of a one sentence letter instead of an effective brief in an individual marginal case is real, notwithstanding the dedication that typifies the profession. If, however, counsel's ultimate evaluation of the case must be supported by a written opinion "referring to anything in the record that might arguably support the appeal," 386 U.S. at 744, 87 S.Ct. at 1400, the temptation to discharge an obligation in summary fashion is avoided, and the reviewing court is provided with meaningful assistance.

Accord High v. *Rhay*, 519 F.2d 109, 112 (9th Cir. 1975).

Because the Ohio Court of Appeals violated *Anders* and refused to afford Penson counsel to argue his nonfrivolous appeal, it unconstitutionally sanctioned appellate counsel's usurpation of Penson's right to appeal. *See Jones* v. *Barnes*, 463 U.S. at 754-55, Justice Blackmun, concurring ("certainly *Anders* . . . indicate[s] that the attorney's usurpation of certain fundamental decisions can violate the Constitution"). The *Anders* procedures were designed to protect the accused's underlying constitutional right to counsel on direct appeal. *Pennsylvania* v. *Finley*, 481 U.S. ___, 95 L.Ed.2d 539 (1987). If *Anders* is not adhered to, the right to counsel is lost. This case is a graphic illustration of that principle.

The requirement that appellate counsel play the role of an active advocate was again reaffirmed in *Jones* v. *Barnes*, 463 U.S. at 754. The Court held that appellate counsel was not required to raise every "colorable" claim requested by the client as it would "disserve the very goal of vigorous and effective advocacy that underlies *Anders*." *Id.* However, counsel is expected to exercise his best professional judgment and choose the issues that will

best support the appeal. No reasonable professional judgment can support an attorney's decision to totally abandon his client and raise no issues in a nonfrivolous appeal. *Laffosse* v. *Walters*, 585 F. Supp. 1209, 1214 (S.D.N.Y. 1984) ("Although assigned counsel may exercise his professional judgment and decide not to raise and argue some nonfrivolous issues, counsel must nevertheless prosecute a nonfrivolous appeal"); *accord People* v. *Barton*, 132 A.D.2d ___, 518 N.Y.S.2d at 287. It is the very antithesis of vigorous and effective advocacy.

More recently, in *Evitts* v. *Lucey*, 469 U.S. at 387, the Court recognized the right to effective assistance of appellate counsel. The Court emphasized that appellate counsel must provide adequate assistance to the defendant if he is to obtain a fair decision on the merits. *Id.* at 395. The Court stated that counsel

> ". . . must be available to assist in preparing and submitting a brief to the appellate court . . . and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. *See Anders* v. *California*, 386 U.S. 738 . . . *Entsminger* v. *Iowa*, 386 U.S. 748 (1967)."

Id. at 394. *Evitts* further reaffirmed *Anders'* minimum constitutional requirement that appellate counsel must file a brief:

> A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. This result is hardly novel. The [petitioner] in . . . *Anders* v. *California*, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967) . . . claimed that, although represented in name by counsel, [he] had not received the type of assistance constitutionally required to render the appellate proceedings fair. In [that case], we agreed

> with the [petitioner], holding that *counsel's failure in Anders to submit a brief on appeal . . . rendered the subsequent [judgment] against the petitioner unconstitutional.* (Emphasis added).

Id. at 396-97.

The *Evitts* Court was simply recognizing the obvious. "The services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Id.* at 393.

> "Our cases dealing with the right to counsel-whether at trial or on appeal-have often focused on the defendant's need for an attorney to meet the adversary presentation of the prosecutor. *See*, e.g., *Douglas* v. *California*, 372 U.S. 353. . ."

Id. at 394 n. 6. It is axiomatic that counsel cannot be an advocate on appeal if he does not file a brief. It is the primary vehicle by which the defendant's claims of error are presented to the appellate court. Thus, "a brief is a necessity." R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* §7.2 at 210 (1981) (quoting Judge Charles E. Clark of the Second Circuit).

> "There must be a brief, to summarize the evidence, to set out the record references, to collect citations, to discuss the authorities - to do all that oral argument cannot do and at the same time to buttress and support and substantiate the impression made by oral argument."

Id. at 210-11 [quoting F. WIENER, *BRIEFING AND ARGUING FEDERAL APPEALS* 32 (1967)].

As stated by Judge Goodrich of the Third Circuit:

> It is hard to overstate the importance of the brief on an appeal. Oral argument . . . is made only once in nearly all instances and it is inevitable that some of its effect will be lost in the interval between the time

> the argument is made and the court opinion appears . . . . [T]he brief speaks from the time it is filed and continues through oral argument, conference, and opinion writing . . . *Certain it is that the brief is the most important thing about an appeal* . . . (Emphasis added).

Id. at 211.

In *Mylar* v. *Alabama*, 671 F.2d 1299 (11th Cir. 1982) *cert. denied*, 463 U.S. 1229 (1983), the Eleventh Circuit stated the importance of appellate counsel's advocacy in a brief:

> As an active advocate, appellate counsel is duty bound to affirmatively promote his client's position before the court. Such a duty not only requires counsel to inform the court of errors committed at trial but additionally mandates that counsel provides legal citations and reasoning to support any claim for relief. Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case.

Id. at 1301.

J. PURVER & LAWRENCE TAYLOR, *HANDLING CRIMINAL APPEALS* §5 at 10-11 (1980), aptly stated appellate counsel's constitutional responsibility to file a brief:

> Inherent in appellate counsel's duty to be an effective advocate for his or her client is the responsibility to present effective written argument. The failure to submit on time an acceptable written brief on behalf of a client is deplorable professional conduct, recognized as ineffective representation amounting to denial of counsel. . .

As recognized in *Anders*, 386 U.S. at 738, counsel's written advocacy is necessary to assist the court in deciding the appeal. *United States* v. *Edwards*, 777 F.2d 364 (7th

Cir. 1985); *Nell*, 811 F.2d at 104. In *Johnson* v. *United States*, 360 F.2d 844, 845 (D.C. Cir. 1966), the court stated that it could not determine whether counsel's conclusions that the appeal was frivolous or without merit were correct in absence of a brief. In a concurring opinion, former Chief Justice (then Judge) Burger stated that even when counsel concludes that the appeal is hopeless, "court-appointed counsel performs an important function." *Id.* at 846. Counsel does so by making sure that the reviewing court understands all the salient facts, the critical issues, and all the relevant legal authorities before making a final decision. *Id.* The former Chief Justice further opined:

> Counsel whose motion [to withdraw] we now deny must remember that under our adversary system an appellate court cannot function efficiently without lawyers to present whatever there is to be said on behalf of an appellant, however meager his claims may be, so that the Court can make an informed appraisal.

Id. at 847. The American Bar Association Project on Standards for Criminal Justice concur:

> "The court's processes will be aided, not impeded, if a trained legal mind has been applied to presentation of the issues. This consideration surely underlies the Supreme Court's position in *Anders*."

STANDARDS RELATING TO THE DEFENSE FUNCTION § 8.3(b) commentary at 299-300 (Approved Draft 1971).

Since counsel's written advocacy in a brief is vital to the appeal, its absence in Penson's case renders counsel's representation nominal at best. But as this Court said in *Evitts*, 469 U.S. at 396:

> ". . . nominal representation on an appeal as of right-like nominal representation at trial-does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."

It is for this reason that the *Anders* requirement that an adequate brief be filed has been upheld by the federal courts of appeal for the Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and District of Columbia Circuits without a showing of prejudice.[6] In *Cannon* v. *Berry*, 727 F.2d 1020 (11th Cir. 1984), the Eleventh Circuit considered whether a showing of prejudice was required to find ineffective assistance of appellate counsel where counsel fails to file a brief. The Court found that counsel's failure was the functional equivalent of having no counsel at all. *Id.* at 1023. The Court reasoned:

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[6] See *Jenkins* v. *Coombe*, 821 F.2d 158 (2nd Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 655 (1988); *Passmore* v. *Estelle*, 607 F.2d 662 (5th Cir. 1979), *cert. denied*, 446 U.S. 937 (1980) (Counsel's submission of one-sentence brief denied accused effective assistance since counsel did not act as advocate); *Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988); *United States* v. *Edwards*, 777 F.2d 364 (7th Cir. 1985) (Court denied counsel's motion to withdraw since he did not identify in his one-page "brief," which was a "no merit" letter, any issues in the record that might conceivably be appealable); *Smith* v. *United States*, 384 F.2d 649 (8th Cir. 1967) (Permission to withdraw could not be granted due to counsel's failure to submit a brief referring to anything in the record that might be argued on appeal); *Cannon* v. *Berry*, 727 F.2d 1020 (11th Cir. 1984); and *Mylar* v. *Alabama*, 671 F.2d 1299 (11th Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983); *Robinson* v. *Black*, 812 F.2d 1084 (8th Cir. 1987) (Appellate counsel's brief inadequate where he briefed all issues in favor of government and concluded appeal was meritless.); *High* v. *Rhay*, 519 F.2d 109 (9th Cir. 1975); *Suggs* v. *United States*, 391 F.2d 971 (D.C. Cir. 1968) (Counsel's brief which stated that there was no substance to the appeal does not satisfy *Anders*); *see also Laffosse* v. *Walters*, 585 F. Supp. 1209 (S.D.N.Y. 1984). *Cf. Griffin* v. *West*, 791 F.2d 1578 (10th Cir. 1986); *Lockhart* v. *McCotter*, 782 F.2d 1275 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 93 L.Ed.2d 827 (1987).

> "If a petitioner like Cannon had to show actual prejudice from the dismissal of his direct state appeal, notwithstanding his failure to follow the *Anders* procedures, there would be a considerable erosion in the enforcement of *Anders*."

Id. at 1024. In other words, the right to the assistance of counsel on appeal could effectively be denied absent a showing of prejudice by the defendant. This is obviously a task as difficult for the accused as representing himself on appeal.

The Eleventh Circuit relied upon its decision in *Mylar* v. *Alabama*, 671 F.2d at 1302, which held that counsel's failure to file a brief on appeal constituted ineffective assistance of counsel. The Court found that the duties of an "active advocate" mandate that appellate counsel assert his client's position in a brief. Independent review by the court is no substitute. *Id.*

> "A brief sets forth a partisan position and contains legal reasoning and authority supporting the defendant's position. The mere fact that appellate courts are obliged to review the record cannot be considered a substitute for the legal reasoning and authority typically found in a brief."

Id.

Similarly, in *Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988), appellate counsel filed a brief stating that the "trial court had committed no error prejudicial to the defendant." *Id.* at 9. The Sixth Circuit refused to require a showing of prejudice because appellate counsel failed to file an adequate brief in compliance with *Anders:*

> Although it might be easy for us to conclude that, faced with a very abbreviated and uncontroverted record, both Freel's counsel and the Ohio Court of Appeals committed no error, we believe that the absence of any evidence of advocacy in the role of appellate counsel presumptively places such a conclusion in serious doubt and vindicates the wisdom of *Anders* . . . If we were to allow the absence of viable issues on appeal to serve as an excuse for counsel's failure to follow the mandates of *Anders*, we would be effectively erasing *Anders* from the books altogether.

Id. at 12-13. *Accord Jenkins* v. *Coombe*, 821 F.2d 158 (2nd Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 655 (1988) (rejecting application of a prejudice test when counsel filed an inadequate brief and withdrew from appeal).

In *High* v. *Rhay*, 519 F.2d at 109, the Ninth Circuit found appellate counsel ineffective when he filed an inadequate brief containing no statement of facts, stating the simple question of the sufficiency of evidence, and inviting the court to review the trial transcript. The court said the brief was "worthless" and that "no client in his right mind would pay one cent for such a performance." *Id.* at 113. The court further held that even though High's appeal would probably be affirmed, even if he were represented by adequate counsel,

> [n]evertheless, High has a right to have an advocate present his case to the Washington Court of Appeals. *Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best argument he can on the facts and the law. Anders* v. *California* (citation omitted). The appellant may not be deprived of the benefit of such appellate representation because his court-appointed counsel fails to perform his clear duty.

Id. at 113.

A number of state courts have also found that appellate counsel's failure to file an adequate brief on appeal constitutes ineffective assistance without a showing of prejudice.[7]

As recognized by the Washington Court of Appeals in *Matter of Frampton*, 45 Wash. App. 554, 560, 726 P.2d 486, 490 (1986), in determining whether prejudice must be shown, the important question is not whether the petitioner was provided some form of appeal by the appellate court. Rather, "the important question is whether the [accused] was afforded an appeal in a constitutional sense." *Id.* The Court concluded that an appellate attorney's failure to present any issues in a brief is tantamount to a denial of his right to appeal which is prejudical per se. *Id.* Thus, where, as here, the defendant is deprived of his right to a complete and effective review of his conviction, he should not be required to demonstrate he was prejudiced or would have prevailed on the appeal.

III. UNDER *STRICKLAND* V. *WASHINGTON*, 466 U.S. 668 (1984), AND *UNITED STATES* V. *CRONIC*, 466 U.S. 648 (1984), STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL, PREJUDICE MUST BE PRESUMED WHEN APPELLATE COUNSEL IS DENIED OR COUNSEL FAILS TO FILE A BRIEF.

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *United States* v. *Cronic*, 466 U.S. 648 (1984), the Court

[7] *Matter of Frampton*, 45 Wash. App. 554, 560, 726 P.2d 486, 490 (1986) (failure to raise any issues in brief); *Ex Parte Dunn*, 514 So.2d 1300 (Ala. 1987) (failure to file brief); *People* v. *Gonzalez*, 47 N.Y.2d 606, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979) (failure to raise any issues in brief); *People* v. *Casiano*, 67 N.Y.2d 906, 492 N.E.2d 1224, 501 N.Y.S.2d 808 (1986) (failure to analyze issues presented by record in brief); *In Re Spears*, 157 Cal. App.3d 1203, 204 Cal. Rptr. 333 (1984) (brief raised no arguable issues); *Carroll* v. *State*, 468 So.2d 186 (Ala. Crim. App. 1985) (failure to file brief); *Loop* v. *Solem*, 398 N.W.2d 140 (S. D. 1986) (failure to file brief).

set standards for determining whether trial counsel rendered ineffective assistance. In doing so the Court acknowledged the vital role counsel plays that is critical to the ability of the adversarial system to produce just results. *Strickland*, 466 U.S. at 685.

> "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."

Cronic, 466 U.S. at 655 [(quoting *Herring* v. *New York*, 422 U.S. 853, 862 (1975)]. The Court stated that counsel must be reasonably competent and supply advice that is "within the range of competence demanded of attorneys in criminal cases." *Id.* at 655. The Court further defined counsel's constitutional role as an advocate:

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders* v. *California*, 386 U.S. 738 . . . The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted-even if defense counsel may have made demonstrable errors-the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id. at 656-57. Thus, the Court indicated that the benchmark for judging any claim of ineffectiveness must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. To meet this test, an accused in most cases must show that counsel's performance was deficient and that it prejudiced the defense. *Id.* at 687. However,

the Court identified two situations where prejudice to the accused would be presumed:

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of the Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Cronic, 466 U.S. at 659; *Strickland*, 466 U.S. at 692; *accord Kimmelman*, 477 U.S. at ___, 91 L.Ed.2d at 332-33 n. 2, Justice Powell, concurring.

Application of the above principles to appellate proceedings[8] requires the conclusion that counsel's failure to file a brief and withdrawal from the appeal violates due process. Such action is not within the range of competence expected of appellate attorneys. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 4-8.3 (Approved Draft 1979). ("Appellate counsel should

[8] *See*, e.g., *Smith* v. *Murray*, 477 U.S. ___, 91 L.Ed.2d 434 (1986), where this Court applied a *Strickland* prejudice test to counsel's failure to raise a particular issue on appeal. A number of federal circuits have also used the *Strickland* standards for judging the performance of appellate counsel. *See Bowen* v. *Foltz*, 763 F.2d 191 (6th Cir. 1985); *Gray* v. *Greer*, 778 F.2d 350 (7th Cir. 1985), *vacated on other grounds*, ___ U.S. ___, 92 L.Ed.2d 734 (1986); *see also Cannon*, 727 F.2d at 1023-24; *Freels*, No. 87-3016, slip op. at 1, 9; *Jenkins*, 821 F.2d at 161; *Griffin* v. *West*, 791 F.2d 1578 (10th Cir. 1986); and *Lockhart* v. *McCotter*, 782 F.2d 1275 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 93 L.Ed.2d 827 (1987), discussed in text below.

not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit"). First, as the Court noted in *Evitts*, 469 U.S. at 396, the accused must face an adversary proceeding on appeal similar to that at trial. He is in need of an attorney to face the adversary presentation of the prosecutor. *Id.* at 394 n. 6. Moreover, counsel must act as a "sword" on appeal to upset the conviction. He must be more of an active advocate for his client than at trial where he acts as a "shield." *See Ross* v. *Moffitt*, 417 U.S. 600, 610-11 (1974). When counsel has not advocated his client's claims in a brief, he is effectively absent from the proceedings. The "sword" has not been unsheathed.

Secondly, counsel who fails to file a brief has not played the role of an advocate and participated in the adversarial process. To be sure, counsel's nonperformance precludes the process from occurring. If counsel's presence is essential to a fair and reliable result, his absence must be presumptively prejudicial. Counsel was absent here. Penson's counsel not only failed to file a brief, he withdrew leaving Penson without counsel on appeal. This Court's analysis in *Evitts*, 469 U.S. at 395, is relevant:

> "In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all. *Cf. Anders* v. *California*, 386 U.S. 738. . ."

See Barnes v. *Jones*, 665 F.2d 427, 437 (2nd Cir. 1981), *rev'd* 463 U.S. 745 (1983) (Judge Meskill, dissenting) (*Anders*' counsel's "complete refusal to brief and argue claims left the defendant totally without the aid of counsel in pressing his appeal").

Accordingly, under *Strickland* and *Cronic* principles, Penson's counsel's action was presumptively prejudicial. As indicated above, the Second, Sixth, and Eleventh Circuits agree that counsel's failure to file an adequate brief is presumptively prejudicial under *Strickland* standards. *Cannon* v. *Berry*, 727 F.2d 1020 (11th Cir. 1984); *Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988); *Jenkins* v. *Coombe*, 821 F.2d 158 (2nd Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 655 (1988).

In *Jenkins* v. *Coombe*, 821 F.2d at 159-60, appellate counsel filed an inadequate brief and then withdrew from the appeal. The state contended that Jenkins should be required to show prejudice under *Strickland* standards. The Court rejected this argument and found counsel's action presumptively prejudicial:

> We think that the *Strickland* [prejudice] test is inapplicable in the circumstances of this case because Jenkins had no counsel or, at best nominal counsel to represent his interests on the state appeal. *Evitts*, 469 U.S. at 396, 105 S.Ct. at 836. *The test makes sense only when a defendant has an attorney assigned or retained to take charge of his defense.* Here, Jenkins appointed attorney was removed before his appeal was submitted to the appellate court for decision, and no replacement was ever assigned. (Emphasis added).

Id. at 161.

The Fifth and Tenth Circuits have reached a different conclusion. *See Griffin* v. *West*, 791 F.2d 1578 (10th Cir. 1986); *Lockhart* v. *McCotter*, 782 F.2d 1275 (5th Cir. 1986) *cert. denied*, ___ U.S. ___, 93 L.Ed.2d 827 (1987). However, their analysis is suspect. Both *Griffin* and *Lockhart* analyzed counsel's failure to file a brief under *Strickland's*, 466 U.S. at 686, "deficient performance" standards, which requires a showing of prejudice. *Griffin*, at 1582; *Lockhart*, at 1283. Neither court considered the presumption of prejudice analysis addressed above which more appropriately applies when counsel's performance is effectively denied. Thus, when counsel fails to file a brief, it is not a "deficient performance," it is "no performance." No performance by counsel is the functional equivalent of having no counsel. This is clearly distinguishable from a "deficient performance" situation where counsel files a brief but does not raise a particular issue. *Galloway* v. *Stephenson*, 510 F. Supp. 840, 844 n.4 (M.D. N.C. 1981). Therefore, Penson submits that the "presumption of prejudice" approach of the Second, Sixth, and Eleventh Circuits in this situation more accurately reflects the intent of *Strickland*. *Accord Ex Parte Dunn*, 514 So.2d at 1303-04 (counsel's failure to file a brief constitutes "actual or constructive denial of assistance of counsel" and *Strickland* requires no showing of prejudice).

In *Cronic*, 466 U.S. at 659 n. 25, the Court also noted the cases where it had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings." *See Geders* v. *United States*, 425 U.S. 80 (1976) (denial of counsel during overnight recess between defendant's direct and cross-examination); *Herring* v. *New York*, 422 U.S. 853 (1975) (denial of closing argument by counsel); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-13 (1972) (statute requiring defendant to testify before any other defense witnesses deprives defendant of "guiding hand of counsel" in presentation of defense); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (denial of counsel at arraignment); *White* v. *Maryland*, 373 U.S. 59 (1963) (denial of counsel at preliminary hearing/arraignment); *Ferguson* v. *Georgia*, 365

U.S. 570 (1961) (counsel not allowed to ask questions of client in unsworn statement); *Williams* v. *Kaiser*, 323 U.S. 471, 475-76 (1945) (counsel denied to defendant who later plead guilty).

These cases amply demonstrate that this Court will not tolerate any significant interference with or denial of counsel's assistance at trial-level proceedings. *Cf. United States* v. *Morrison*, 449 U.S. 361 (1981) (pre-trial Sixth Amendment violation resulted in no prejudice to counsel's ability to provide adequate representation). By the same token, this Court should not permit appellate counsel or a state appellate court on direct appeal to completely deny an accused any assistance by counsel. It is certainly as egregious a violation of the right to counsel as the examples cited above, if not more so.

IV. THE OHIO COURT OF APPEALS' INDEPENDENT REVIEW OF THE RECORD AND CONSIDERATION OF THE ISSUES RAISED IN PENSON'S CO-DEFENDANTS' APPEALS DID NOT RENDER THE DENIAL OF THE RIGHT TO COUNSEL NON-PREJUDICIAL OR AFFORD HIM THE ADEQUATE AND EFFECTIVE REVIEW TO WHICH HE WAS ENTITLED.

The lower court found that Penson was not prejudiced by his counsel's withdrawal from the appeal because it had examined the record and considered the errors raised in the co-defendants' appeals.[9] (J.A. 40-44). The court's

[9] From the Court's opinion, see J.A. 38, one is unable to determine whether the court was applying a *Chapman* v. *California*, 386 U.S. 18 (1967), "harmless error" standard or a *Strickland*, 466 U.S. 668, "prejudice" standard. While both are "outcome determinative" standards, they are substantially different in terms of who bears the burden of proof. Chapman requires the state to bear the burden of proving beyond a reasonable doubt that the error did not contribute to the result, *Chapman*, 386 U.S. at 24; whereas *Strickland*, 466 U.S. at 694, requires the accused to show that there is a reasonable probability that the result would have been otherwise if counsel's performance had not been deficient. Who bears the burden of proof on as important an issue as the right to counsel can obviously make a difference as to whether the accused gets counsel. *Cf. Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). Penson was entitled to know by what standard the court was judging the denial of counsel and the court's failure to identify it denies due process.

action did not remedy the denial of counsel or afford him the adequate and effective review to which he was entitled.

This Court, in a long line of cases, has guaranteed that indigents have an adequate opportunity to present their claims fairly within the appellate adversary system. *Ross* v. *Moffitt*, 417 U.S. at 612; *see also Griffin* v. *Illinois*, 351 U.S. 12 (indigent has right to free transcript); *Entsminger* v. *Iowa*, 386 U.S. 748 (1967) (indigent's right to entire record on appeal); *Draper* v. *Washington*, 372 U.S. 487 (1963) (indigent's right to a transcript to challenge trial court's finding of frivolity); *Eskridge*, 357 U.S. 214 (1958) (right to a free transcript despite judge's finding trial was error free); *Burns* v. *Ohio*, 360 U.S. 252 (1959) (indigent's right to waiver of filing fees). As demonstrated above, the right to effective counsel is essential to the appellate process to insure that the accused's claims are "meaningfully" presented. *Douglas*, 372 U.S. at 358, *Evitts*, 469 U.S. at 397. When the right to counsel has been denied, this court has not inquired into the merits of the appeal before reversing. *Evitts*, 469 U.S. at 387.

In *Douglas*, *Swenson*, and *Anders*, the state courts had reviewed the records and concluded that there was no merit to the appeals. The Court's reversals in these cases reflect a recognition that the accused receives a substan-

tial benefit from appellate counsel's advocacy and that appellate issues cannot be fairly decided without it. *See Douglas*, 372 U.S. at 358 (indigent benefits from counsel's examination of record, research of law, and marshalling of arguments in his behalf); *Swenson*, 386 U.S. at 259 (counsel's discussion in brief of claims of error and citation of relevant portions of transcript benefit the defendant); *Anders*, 386 U.S. at 745 (no-merit letter affords client nor court any aid, requiring the client to shift for himself while the court has only the cold record which it must review without the help of an advocate). *See also Rodriguez* v. *United States*, 395 U.S. 327 (1969) (Court refused to apply a harmless error rule to the denial of an appeal because there was no reason to add an additional hurdle to those whose initial right to appeal had been frustrated); *United States ex rel. Williams* v. *LaValle*, 487 F.2d 1006 (2nd Cir. 1973), *cert. denied*, 416 U.S. 916 (1974) (underlying merits have no bearing on the question of restoring fundamental appellate rights where they have been wrongfully denied); *Hollis* v. *United States*, 687 F.2d 257 (8th Cir. 1982), *cert. denied*, 465 U.S. 1036 (1984) (prejudice need not be shown where counsel ineffective); *accord Robinson* v. *Wyrick*, 635 F.2d 757, 758 (8th Cir. 1981).

Independent review of the record by the court cannot adequately substitute for the assistance counsel provides his client and the court. *Mylar*, 671 F.2d at 1302; *Jenkins*, 821 F.2d at 161; *Johnson*, 360 F.2d at 846.

Moreover, the function of our appellate courts is to judge, not advocate issues. Busy appellate judges cannot be expected to peruse the record for errors as an advocate does and fashion an argument for them based on the pertinent law and facts. As this Court knows, legal arguments on some issues are quite involved and develop only

after extensive legal research. It is sheer folly to suggest that judges reviewing records will routinely think of them or that they should be required to. That is counsel's role. There is no adequate substitute for it. As the New York Court of Appeals observed in *People* v. *Gonzalez*, 47 N.Y.2d 606, 611, 393 N.E.2d 987, 991, 419 N.Y.S.2d 913, 916 (1979):

> "Appellate counsel not infrequently advance contentions which might otherwise escape the attention of judges of busy appellate courts, no matter how conscientiously and carefully those judges read the records before them. (*People* v. *Emmett*, 25 N.Y.2d 354, 356, 254 N.E.2d 744, 745, 306 N.Y.S.2d 433, 435, supra)."

Indeed, even attorneys sometimes fail to raise meritorious issues and procedurally default them. *See Murray* v. *Carrier*, 477 U.S. ___, 91 L.Ed.2d 397 (1986); *Smith* v. *Murray*, 477 U.S. ___, 91 L.Ed.2d 434 (1986); *Engle* v. *Isaac*, 456 U.S. 107 (1982).

Nor can the right to counsel be satisfied vicariously through another appellate attorney's representation of a co-defendant. The right to counsel is a personal right and can only be satisfied by counsel representing the accused's personal interests. *See Kimmelman*, 477 U.S. ___, 91 L.Ed.2d at 331 (1986), Justice Powell, concurring (". . . the right to effective assistance of counsel is personal to the defendant and is explicitly tied to the defendant's right to a fundamentally fair trial . . ."). As Justice Black wrote in *Von Moltke* v. *Gillies*, 332 U.S. 708, 725 (1948):

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. *Glasser* v. *United States*, 315 U.S. 60, 70."

Counsel representing a co-defendant simply does not do that. In this case, Penson's co-defendants' attorneys did not represent his interests on appeal or present errors on his behalf.

Like a trial, an appeal may present a number of possible claims, some unique to each defendant. *See Engle*, 456 U.S. at 133; *Murray*, 477 U.S. at ____, 91 L.Ed.2d at 407. The Court has recognized that the hallmark of effective appellate advocacy is to "winnow out" the weaker issues and focus on the stronger ones. *Jones*, 463 U.S. at 751-52; *Smith*, 477 U.S. ____, 91 L.Ed.2d at 445. Because appellate advocacy is an art, attorneys will evaluate the merits of an appeal and the issues it presents differently. As a result, attorneys for co-defendants will often not argue the same issues. This case is a good example. Counsel for Richard Brooks, one of Penson's co-defendants, raised six issues on Brooks' appeal while counsel for John Smith raised only three for him, only one of which was the same as any issue raised by Brooks. *See State* v. *Brooks* (June 4, 1987), Montgomery App. No. 9190, unreported; *State* v. *Smith* (May 13, 1987), Montgomery App. No. 9168, unreported; *State* v. *Smith* (June 5, 1987), Montgomery App. No. 9168, unreported (Amended Opinion.)[10] If Penson had had effective counsel, counsel may have very well raised different issues on his appeal. Therefore, it is fundamentally unfair to deprive him of his personal right to counsel on appeal.

Similarly, it is not uncommon for attorneys to fail to raise, or procedurally default, issues on appeal. *See Murray*, 477 U.S. ____, 91 L.Ed.2d 397; *Smith* 477 U.S. ____, 91 L.Ed.2d 434; *Engle*, 456 U.S. 107.

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[10] These decisions have been lodged with the Clerk.

> "It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule."

Murray, 477 U.S. at ____, 91 L.Ed.2d at 445. If co-counsels' representation is considered constitutionally adequate, Penson would be bound by their mistakes. *See, e.g., Murry*, 477 U.S. at ____, 91 L.Ed.2d at 411. Fairness requires that the state provide Penson with his own attorney before it summarily enforces procedural defaults against him. *See id.* at 408. ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default").

In *Jenkins* v. *Coombe*, 821 F.2d at 158, the Second Circuit considered a situation where the accused was without counsel on appeal when his attorney withdrew after filing an inadequate brief. The accused filed a *pro se* brief after copying significant portions of his co-defendant's attorney's brief. *Id.* at 160. The Court found that this did not satisfy Jenkins right to the effective assistance of counsel on appeal.

> Although Jenkins was able to raise two points in addition to those successfully advanced by his co-defendant's counsel, it is quite possible that an attorney would have found other arguments or would have been more articulate in the presentation of the case on appeal.
>
> "[N]either a review of the record by the Appellate Division nor a pro se brief can substitute for the single-minded advocacy of appellate counsel." *People* v. *Casiano*, 67 N.Y.2d 906, 907, 492 N. E.2d 1224, 1225, 501 N.Y.S.2d 808 (1986).

Id. at 161. The Court indicated that it was not necessary to speculate on the type of assistance that could have been provided or on the possible outcome of the appeal. Reversal was required because Jenkins had been denied counsel on appeal. *Id.* at 162.

The same analysis applies here. It is not possible to speculate as to how the Ohio Court of Appeals would have decided arguments or issues that could have been raised if Penson had effective counsel. Only that court can provide the answer after hearing the legal arguments of counsel on both sides.

It makes a mockery of Penson's right to counsel on appeal to suggest that it can be vicariously satisfied through co-defendants' counsel. Such a rule would permit appellate courts, where there are co-defendants, to assign an attorney to represent only one of them, and bind the rest by the result. Such a scenario compels the conclusion that the right to counsel on appeal is a personal right and can only be satisfied by counsel who represents the accused's interests and files a brief on his behalf.

If the denial of counsel had occurred at a trial where there were co-defendants represented by separate counsel, it is clear that prejudice would be presumed. *See, e.g., Green* v. *Arn*, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, ___ U.S. ___, 98 L.Ed.2d 17 (1987) (prejudice presumed where counsel absent for portion of trial involving co-defendants represented by separate counsel). A complete denial of counsel on appeal should be treated no differently.

Similarly, if an accused represented himself at trial or on appeal, but there had not been a proper waiver of counsel, the court would not judge the quality of his self-representation to see if he had been prejudiced. The right

to counsel is either respected or denied. *Faretta* v. *California*, 422 U.S. 806 (1975); *McKaskle* v. *Wiggins*, 465 U.S. 168, 178 n. 8 (1984). It is not subject to a prejudice or harmless error test. *McKaskle, id.*

Because he was effectively denied counsel on appeal, Penson has not been afforded an opportunity to present his claims fairly to the Ohio appellate courts. In *Ross* v. *Moffitt*, 417 U.S. at 612, this Court held that an indigent state defendant did not have a right to counsel in the state supreme court where review by the court was discretionary. The Court reached this result because the accused's claims of error had "once been presented by a lawyer and passed upon by an appellate court"; *id.* at 614; and that this afforded him an opportunity to present his claims to the state appellate courts. *Id.* at 616. By contrast, Penson has not had "his claims" of error "presented by a lawyer and passed upon by an appellate court." This resulted in Penson being further denied meaningful access to the Supreme Court of Ohio. *Cf. Ross, id.* at 615. The Ohio Supreme Court will not consider issues that were not raised and preserved in the Court of Appeals. *Toledo* v. *Reasonover* (1965), 5 Ohio St.2d 22, 213 N.E.2d 179. Since Penson was denied "meaningful access," see *Ross, id.* at 615, to the Ohio appellate courts, he has not received the adequate and effective review to which he is constitutionally entitled. To hold otherwise is to remove the logical underpinning of this Court's decision in *Ross*.

V. THE RIGHT TO COUNSEL ON APPEAL PROTECTS IMPORTANT VALUES AND POLICIES IN OUR CRIMINAL JUSTICE SYSTEM WHICH WOULD BE JEOPARDIZED IF ITS DENIAL COULD BE CONSIDERED NON-PREJUDICIAL OR HARMLESS ERROR.

This Court has recognized that there are certain rights that are so fundamental to our system of justice that their

denial "can never be treated as harmless error." *See Chapman* v. *California*, 386 U.S. 18, 23 (1967). Among these is the right to counsel. *Id.* at 23 n. 8; *accord Rose* v. *Clark*, 478 U.S. ___, 92 L.Ed.2d 460 (1986) ("Harmless error analysis . . . presupposes a trial at which the defendant [is] represented by counsel. . .").

> "The right to the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."

Glasser v. *United States*, 315 U.S. 60 (1942); *accord Delaware* v. *Van Arsdall*, 475 U.S. ___, 89 L.Ed.2d 674, 685 (1986) (denial of counsel is error so fundamental and pervasive that reversal is required without regard to facts or circumstances of case). Of course, this Court has treated the denial of counsel differently than a violation of the Sixth Amendment which results in no prejudice to the ability of counsel to provide effective representation. *Cf. Moore* v. *Illinois*, 434 U.S. 220 (1977) (admission of witness identification in violation of right to counsel harmless error), and *Morrison*, 449 U.S. 361 (1981) (pretrial Sixth Amendment violation resulted in no prejudice to counsel's ability to provide adequate representation) with *Gideon*, 372 U.S. at 335 (1963) (denial of counsel at trial reversible error). This reflects the Court's policy to tailor the remedy to the injury suffered. *Morrison*, 449 U.S. at 365. Here, Penson was clearly denied counsel as his counsel provided no representation.

As demonstrated above, the due process right to counsel on appeal is one of the "minimum safeguards" necessary to assure an adequate and effective appeal for indigent defendants. *Evitts*, 469 U.S. at 392. Counsel's presence and effective participation in the appellate proceedings is essential to ensure their integrity and fairness. *Id.* at 395.

Like the denial of counsel at trial, the denial of counsel on appeal not only infects the validity of the judgment rendered by the court, but the very process by which it was obtained. *See Rushen* v. *Spain*, 464 U.S. 114, 124 n. 3 (1983), Justice Stevens, concurring. *Cf. Cronic*, 466 U.S. at 659. Therefore, the right to counsel for first appeals of right protects the fairness, and thus the legitimacy, of our adversary process. *Kimmelman*, 477 U.S. ___, 91 L.Ed.2d 305, 318. To deny this right is to jeopardize the very foundation of our "system for finally adjudicating the guilt or innocence of a defendant." *Griffin*, 351 U.S. at 18. *Accord Tehan* v. *Shott*, 382 U.S. 406, 416 (1966). As stated by the Court in *Griffin:*

> All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus, to deny adequate review to the poor means that many of them may lose their life, liberty and property because of unjust convictions which appellate courts would set aside . . . There can be no justice where the kind of trial a man gets depends on the amount of money he has.

Id. at 18-19. *See also Jones*, 463 U.S. at 756 n.1, Justice Brennan, dissenting ("the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction").

To require a showing of specific prejudice to a denial of counsel on appeal would have serious negative effects on

our state systems of appellate justice. It would permit our state appellate courts to do indirectly what they could not do directly since *Douglas*—deny an indigent accused his right to an advocate on appeal. Once appointed counsel reviewed the record and determined there was no merit to the appeal, the court, if it agreed, could affirm the conviction. The court could do this despite the failure of counsel to brief arguable, nonfrivolous issues, as in the case at bar. The accused would then have to somehow show that he was prejudiced or would have won the appeal had he been given counsel, to obtain another appeal. Few, if any, unrepresented, indigent defendants could reasonably be expected to do so any more than they could be expected to pursue their own appeal in the first place. Moreover, to extend this scenario to its logical conclusion, most indigent defendants could be denied counsel since most appeals are unsuccessful. Such appellate practices would clearly nullify the *Anders* decision and the right to counsel which it is designed to protect. *See Finley*, 481 U.S. at ___, 95 L.Ed.2d at 539. As a result, fair and reliable determinations of appeals would be undermined.

If such a hypothetical sounds farfetched, it is not. A number of intermediate appellate courts in Ohio have been affirming convictions under that very procedure.[11]

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[11] *See, e.g., State* v. *Freels* (April 4, 1984), Ham. App. No. C-830585, unreported, *rev'd, Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988); *State* v. *McLindon* (Nov. 5, 1986), Ham. App. No. C-850868, unreported (First Appellate District); *State* v. *Poole* (Oct. 20, 1987), Allen App. No. 1-86-43, unreported (Third Appellate District); *State* v. *Sykes* (Jan. 26, 1984), Mahoning App. No. 82CA115, unreported; *accord State* v. *Toney*, (1970), 23 Ohio App.2d 203, 262 N.E.2d 419 (Seventh Appellate District); *State* v. *Birchfield* (Dec. 8, 1986), Butler App. No. CA86-07-099, unreported (Twelfth Appellate District). These unreported decisions have been lodged with the Clerk. Penson's case is from the Second Appellate District. *Cf. State* v. *Duncan* (1978), 57 Ohio App.2d 93 385 N.E.2d 323 (Eighth Appellate District).

As the Sixth Circuit recognized in *Freels*, ___ F.2d ___, No. 87-3016, slip op. at 12:

> "It is our observation that *Freels'* case is unfortunately not unique and that the advantages and requirements of *Anders*, although straightforward, are often ignored."

The only difference between Penson's case and the other Ohio cases is that the court below considered the issues raised by Penson's co-defendants. If the right to counsel on appeal is not to be further eroded in the Ohio appellate courts, this court must draw the line in this case. *See Cannon*, 727 F.2d at 1024.

Additionally, requiring a showing of prejudice for noncompliance with *Anders* would substantially burden our state appellate courts. Courts would have to search the record for issues in order to determine if the accused was prejudiced by counsel's inaction. The court would be forced to virtually speculate as to the outcome of the issues without briefing and oral argument, the very cornerstones of appellate advocacy. The court would not have the benefit of counsel's references to the record and citation of legal authorities, see *Anders*, 386 U.S. at 745, but would have to review a cold record without the help of counsel. *Id.* In short, the court would be forced to perform counsel's function. Moreover, meagerly paid appointed counsel would be encouraged to shift responsibility for review of the record to the court if *Anders* could be ignored. The inevitable effect of removing *Anders'* requirement that an adequate brief be filed would be a disintegration of the right to counsel on appeal for many indigent defendants. This is evident now in a number of Ohio appellate districts. *See* Ohio cases cited above, at 42, n. 11 and the *Amicus Curiae* Brief of the Ohio Association of Criminal Defense Lawyers, at § I.

Proper respect for the right to counsel on appeal requires recognition of the proper roles of counsel and the appellate court. It should be counsel's job, not the court's, to review the record for errors and present legal arguments on the nonfrivolous claims he believes best support the appeal. *See Jones*, 463 U.S. at 754. It is counsel's constitutional responsibility to perform as an advocate and the *Anders* decision and procedures are the means by which the court sees that counsel fulfills that responsibility. *See Nickols* v. *Gagnon*, 454 F.2d at 471; *Finley*, 481 U.S. at ___, 95 L.Ed.2d at 545. Similarly, it is the court's job, not counsel's, to judge the merits of the appeal. *United States* v. *Blackwell*, 767 F.2d 1486 (11th Cir. 1985). The District of Columbia Court of Appeals in *Suggs* v. *United States*, 391 F.2d 971 (D.C. Cir. 1968) described the appropriate relationship between court and counsel:

> Our role as a court is as arbiter of the interests of Government and accused. We cannot successfully and constitutionally perform that function unless we consider a presentation devoted to arguments for the accused, leaving it to us to determine whether and to what extent they have merit. That is our understanding, at least, of the philosophy underlying *Anders*.

Id. at 975. Of course, if the court does not require counsel to comply with *Anders*, as in the instant case, the right to counsel is meaningless.

The result argued for by respondent would have further negative implications. Because a denial of counsel does not satisfy the appearance of justice, it places a cloud of suspicion over our appellate system of justice:

> . . . [F]inal judgment against an indigent should not be compromised by a possibility that a different result would have ensued if only he had the resources

> to retain his own lawyer, instead of being required to accept counsel selected by the court. Much depends on a system that avoids suspicion of such compromise, for reasons that include awareness that where there is a basis for such suspicion prospects of rehabilitation are stifled. *Justice must not only be done, it must appear to be done*, *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).

Suggs, 391 F.2d at 974. The indigent accused denied the assistance of counsel on appeal would not feel he had been dealt with fairly by the system. *See id.* at 974. This would likely generate further *pro se* filings and litigation by the accused that the courts and prosecutors would have to answer. This result would not contribute to the finality of litigation. Claims of ineffective assistance of appellate counsel would likely increase in the state and federal courts. Federal courts would be called on in federal habeas proceedings to determine if the state appellate court's determination that the defendant was not prejudiced was correct. The Court would, like the state appellate court, probably have to review the record without any previous identification or discussion of issues by counsel. This would include analyzing state law issues. Principles of comity discourage federal court intrusion into matters more appropriately left to the state courts. *Galloway* v. *Stephenson*, 510 F. Supp. at 844.

On the other hand, a rule applying a presumption of prejudice when counsel is constructively denied is easy for the courts to follow. The violation is easy to identify and because the court is directly responsible, easy for the court to prevent. *See Strickland*, 466 U.S. at 692; *Cannon*, 727 F.2d at 1024 n. 9. It further accords the appropriate respect for the fundamental right to counsel on appeal; and provides the accused counsel who renders constitutionally effective assistance as an advocate. Of the possi-

ble alternatives, it is surely the best way to guarantee an indigent accused an opportunity for an adequate and effective review of his conviction.

CONCLUSION

For the foregoing reasons, Petitioner Steven Anthony Penson requests that the judgment of the Montgomery County, Ohio Court of Appeals be reversed and that the court be ordered to provide him with another appeal in which he is afforded the assistance of counsel.

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender

GREGORY L. AYERS
Chief Counsel
Counsel of Record

DAVID C. STEBBINS
Senior Assistant
State Public Defender

GEORGE A. LYONS
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: (614) 466-5394

Counsel for Petitioner

APPENDIX

APPENDIX

OHIO CONSTITUTION

ARTICLE IV: JUDICIAL

§ 3 Court of Appeals.

(A) The state shall be divided by law into compact appeals districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of the judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals. (Adopted May 7, 1968. Former § 3 repealed and analogous provisions reenacted as § 4.)

OHIO REVISED CODE

§ 2903.11. Felonious assault.

(A) No person shall knowingly:

(1) Cause serious physical harm to another;

(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of felonious assault, an aggravated felony of the second degree. If the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, felonious assault is an aggravated felony of the first degree.

OHIO REVISED CODE

§ 2907.02. Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgement or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of the such person.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the

victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

OHIO REVISED CODE

§ 2907.05. Gross sexual imposition.

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's, or one of the other persons', judgement or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A)(1) or (2) of this section is a felony of the fourth degree. Violation of division (A)(3) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweight its probative value.

Evidence of specific instances of the defendant's sexual

activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request appoint counsel to represent the victim without cost to the victim.

OHIO REVISED CODE

§ 2911.01. Aggravated Robbery.

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control.

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, an aggravated felony of the first degree.

OHIO REVISED CODE

§ 2911.11. Aggravated burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

(B) Whoever violates this section is guilty of aggravated burglary, an aggravated felony of the first degree.

OHIO REVISED CODE

§ 2923.02. Attempt.

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of such offense, or of conspiracy to commit such offense, shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the

offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(E) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder or murder is a felony of the first degree. An attempt to commit an aggravated felony of the first or second degree is an aggravated felony of the next lesser aggravated degree than the aggravated felony attempted. An attempt to commit an aggravated felony of the third degree is a felony of the fourth degree. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

OHIO REVISED CODE

§ 2923.13. Having weapons while under disability.

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) Such person is a fugitive from justice;

(2) Such person is under indictment for or has been convicted of any felony of violence, or has been adjudged a juvenile delinquent for commission of any such felony;

(3) Such person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in

any drug of abuse, or has been adjudged a juvenile delinquent for commission of any such offense;

(4) Such person is drug dependent or in danger of drug dependence, or is a chronic alcoholic;

(5) Such person is under the adjudication of mental incompetence.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the fourth degree.

OHIO REVISED CODE

§ 2929.71. Additional three years of actual incarceration for offenses involving a firearm.

(A) The court shall impose a term of actual incarceration of three years in addition to imposing a life sentence pursuant to section 2907.02, 2907.12, or 2929.02 of the Revised Code or an indefinite term of imprisonment pursuant to section 2929.11 of the Revised Code if both of the following apply:

(1) The offender is convicted of, or pleads guilty to, any felony other than a violation of section 2923.12 of the Revised Code;

(2) The offender is also convicted of, or pleads guilty to, a specification charging him with having a firearm on or about his person or under his control while committing the felony. The three-year term of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to, the life sentence or the indefinite term of imprisonment.

(B) If an offender is convicted of, or pleads guilty to, two or more felonies and two or more specifications charging him with having a firearm on or about his person or under his control while committing the felonies, each of the three-year terms of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to the life sentences or indefinite terms of imprisonment imposed pursuant to section 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code, unless any of the

felonies were committed as part of the same act or transaction. If any of the felonies were committed as part of the same act or transaction, only one three-year term of actual incarceration shall be imposed for those offenses, which three-year term shall be served consecutively with, and prior to, the life sentences or indefinite terms of imprisonment imposed pursuant to section 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code.

(C) No person shall be sentenced pursuant to division (A) of this section unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.141 [2941.14.1] of the Revised Code.

(D) As used in this section:

(1) "Firearm" has the same meaning as in section 2923.11 of the Revised Code;

(2) "Actual incarceration" has the same meaning as in division (C) of section 2929.01 of the Revised Code, except that a term of actual incarceration imposed pursuant to this section shall not be diminished pursuant to section 2967.19 of the Revised Code.

OHIO REVISED CODE

§ 2953.02. Review of judgments.

In a criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. A final order of an administrative officer or agency may be reviewed in the court of common pleas. A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. This right of appeal from judgments and final orders of the court of appeals shall extend to cases in which the death penalty has been affirmed, felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or general interest wherein the supreme court has granted a motion to certify the record of the court of appeals. The

supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except as provided in section 2929.05 of the Revised Code.

OHIO RULES OF APPELLATE PROCEDURE

RULE 3. APPEAL AS OF RIGHT-HOW TAKEN

(A) Filing the Notice of Appeal. An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

(B) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(C) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(D) Service of the Notice of Appeal. The clerk of the trial court shall serve notice of the filing of a notice of appeal and, where required by local rule, a docketing statement, by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and the clerk shall mail or otherwise forward a copy of the notice of appeal and of the docket entries,

together with a copy of all filings by appellant pursuant to Rule 9(B), to the clerk of the court of appeals named in the notice. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

(E) Amendment of the Notice of Appeal. The court of appeals within its discretion and upon such terms as are just may allow the amendment of a timely filed notice of appeal.

(F) Docketing Statement. If the court of appeals has adopted an accelerated calendar by local rule pursuant to Rule 11.1, a docketing statement shall be filed with the Clerk of the trial court with the notice of appeal. (See Form 2, Appendix of Forms.)

The purpose of the docketing statement is to determine whether an appeal will be assigned to the accelerated or the regular calendar.

A case may be assigned to the accelerated calendar if any of the following apply:

(1) No transcript is required (e.g., summary judgment or judgment on the pleadings);

(2) The length of the transcript is such that its preparation time will not be a source of delay;

(3) An agreed statement is submitted in lieu of the record;

(4) The record was made in an administrative hearing and filed with the trial court;

(5) All parties to the appeal approve an assignment of the appeal to the accelerated calendar; or

(6) The case has been designated by local rule for the accelerated calendar.

The court of appeals by local rule may assign a case to the accelerated calendar at any stage of the proceeding.

The court of appeals may provide by local rule for an oral hearing before a full panel in order to assist it in determining whether the appeal should be assigned to the accelerated calendar.

Upon motion of appellant or appellee for a procedural order pursuant to App.R.15(B) filed within seven days after the notice of appeal is filed with the clerk of the trial court, a case may be removed for good cause from the accelerated calendar and assigned to the regular calendar. Demonstration of a unique issue of law which will be of substantial precedential value in the determination of similar cases will ordinarily be good cause for transfer to the regular calendar.

No. 87-6116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STEVEN ANTHONY PENSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

BRIEF FOR RESPONDENT

LEE C. FALKE,
Prosecuting Attorney
Montgomery County, Ohio
Montgomery Cty. Courts Bldg.
41 N. Perry Street
Suite 800
Dayton, Ohio 45402
Telephone: (513) 225-5757

MARK B. ROBINETTE
Special Assistant
Prosecuting Attorney
20 E. Tabb Street
Suite 101
Petersburg, Virginia 23803
Telephone: (804) 861-8899
Counsel of Record for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

I.

QUESTIONS PRESENTED:

I. CAN THE PETITIONER ESTABLISH HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHERE HE HAS FAILED TO POINT TO SPECIFIC ERRORS OR OMISSIONS MADE BY HIS APPELLATE COUNSEL WHICH SHOW, IN LIGHT OF ALL THE CIRCUMSTANCES, THAT HIS APPELLATE COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND WHICH ESTABLISH A REASONABLE PROBABILITY THAT, BUT FOR HIS APPELLATE COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT?

II. IS AN ALLEGED CONSTITUTIONAL VIOLATION WHICH IS BASED UPON THE FILING OF AN INADEQUATE *ANDERS* BRIEF BY COURT-APPOINTED COUNSEL ON DIRECT APPEAL SUBJECT TO HARMLESS ERROR ANALYSIS PURSUANT TO *CHAPMAN* V. *CALIFORNIA*, 386 U.S. 18 (1967)?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On August 10, 1984, Petitioner was indicted by the Montgomery County Grand Jury on one (1) count of Rape, pursuant to Ohio Revised Code (hereinafter referred to as "R.C.") 2907.02(A)(1), with a firearm specification, pursuant to R.C. 2929.71 and 2941.141 (Joint Appendix, hereinafter refered to as "J.A.", p. 2-3). On August 14, 1984, the grand jury indicted Petitioner on twenty (20) additional counts of Rape, each count containing a firearm specification; one (1) count of Aggravated Burglary, pursuant to R.C. 2911.11(A)(3), with a firearm specification; two (2) counts of Aggravated Robbery, pursuant to R.C. 2911.01(A)(1), each

count containing a firearm specification; two (2) counts of Felonious Assault, pursuant to R.C. 2903.11(A)(2), each count containing a firearm specification; one (1) count of Felonious Sexual Penetration, pursuant to R.C. 2907.12(A)(1) and 2923.02, with a firearm specification; and one (1) count of Gross Sexual Imposition, pursuant to R.C. 2907.05(A)(1), with a firearm specification (J.A., p. 4-23). On August 21, 1984, the grand jury added prior aggravated felony conviction specifications to each count of Petitioner's previous indictments and further indicted Petitioner on one count of Having Weapons While Under Disability, in violation of R.C. 2923.13(A)(2), with said count containing a firearm specification and a prior aggravated felony conviction specification (J.A., p. 24-32). Petitioner was tried jointly with co-defendants John A. Smith, Jr. and Richard Brooks, before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding Petitioner guilty on fourteen counts of Rape with firearm specifications on each count; guilty of Aggravated Burglary with a firearm specification; guilty of two counts of Aggravated Robbery with firearm specifications on each count; guilty of two counts of Felonious Assault with firearm specifications on each count; guilty of Attempted Rape with a firearm specification; guilty of Gross Sexual Imposition with a firearm specification; and guilty of Having Weapons While Under Disability with a firearm specification. Except for Counts Five and Six, each count of which Petitioner was convicted contained a finding that he had previously been convicted of Felonious Assault (Docket Entry #24).

On December 27, 1984, the trial court filed an entry and order sentencing Petitioner to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six; not less than twelve (12) years nor more than fifteen (15) years on counts five, six and eight; and not less than three (3) years nor more than five (5) years on count twenty-nine. On Count

Two there is an additional term of three (3) years actual incarceration for the firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served concurrently with each other and all sentences are to be served consecutively with the sentence imposed in Case No. 84-CR-1056. An amended entry and order was filed on January 9, 1985 to state that all sentences pertaining to the rape counts were to be served as actual incarceration. (J.A., p. 33-34).

Petitioner timely filed his Notice of Appeal from his judgment and sentence (Docket Entries #31 and #32). Petitioner's appellate counsel filed an *Anders* brief in the Montgomery County Court of Appeals on June 2, 1986, stating that there were no meritorious issues to be raised on appeal. (J.A., p. 35-36). On June 9, 1986, Douglas Shaeffer was permitted to withdraw as appellate counsel for Petitioner and the Petitioner was allowed 30 days to file his own brief. (J.A., p. 37). Although several extensions of time were granted allowing Petitioner additional time to file his brief, no brief was ever filed.

After reviewing and deciding the appeals filed by co-defendants Richard Brooks, unreported, Montgomery App. No. 9190 (June 4, 1987) and John A. Smith, Jr., unreported, Montgomery App. No. 9168 (May 13, 1987), the Montgomery County Court of Appeals, pursuant to its duties under *Anders* v. *California*, 386 U.S. 738 (1967), undertook a full examination of the record to determine whether the Petitioner received a fair trial and whether any grave or prejudicial errors occurred during the trial. The Court of Appeals stated in its Opinion that the record did support several arguable claims which were fully considered in the appeals of the co-defendants, Brooks and Smith. *State* v. *Steven Anthony Penson*, unreported, Montgomery App. No. 9193, (June 5, 1987), J.A., p. 40-41. Based upon its review of the record and consideration of the issues raised in the appeals of the co-

defendants, the Court of Appeals reversed Petitioner's conviction for Felonious Assault as charged in Count Six of the indictment and affirmed his conviction on the other counts (J.A., p. 42-43).

Petitioner filed his Notice of Appeal to the Ohio Supreme Court on July 6, 1987. On October 21, 1987, the Ohio Supreme Court filed an Entry dismissing Petitioner's appeal for want of a substantial constitutional question. The petition for writ of certiorari filed herein was granted by this Honorable Court on February 22, 1988. (J.A., p. 47).

On August 4, 1984, James Jones and his wife, Deborah Jones, and their two children were living at 1947 Fairport Avenue, Apartment 104, in Montgomery County, Ohio. Residing with them at that time was James' sister, Mary Jones, and her son (Trial transcript, hereinafter "T. Tr.", at 200-01; 215). Although they had no electric service in their apartment at that time, a nearby street lamp and two other overhead lamps on a church and school across the street provided light inside the apartment (T. Tr. 200-03). At around 3:00 a.m. that morning, a man whom James knew as Steve Penson, crashed through their bedroom window knocking down the blind as he came in (T. Tr. 204; 250). James testified at trial that he had known Penson since about March 1984 and had seen him about 15 to 20 times prior to August 4, 1984 (T. Tr. 197-98).

James further testified that Penson had a pistol and ordered him and Deborah to freeze. Penson then said to James, "Yes, mother fucker, you thought I wasn't coming, didn't you? I have been over here before and you should have had enough sense to move out of here." (T. Tr. 204). Penson then pointed the gun at James' head and ordered him to sit down. After James sat down Penson kicked him in the chin. Penson asked James where the money was, to which James replied that he had no money but did have some food stamps in his jacket. Penson told him not to try anything tricky and went over to where the jacket was and took the food stamps. At that time,

two men later identified as Richard Brooks and John Albert Smith, Jr. kicked in the front door of the apartment and came inside (T. Tr. 204-05).

James Jones stated that he had known Brooks since about June 1984 and had seen him at least ten times prior to August 4, 1984. While he did not know John Smith by name on August 4, 1984, James stated that he had seen Smith in the neighborhood on two or three occasions prior to that time (T. Tr. 199-200).

After Brooks and Smith entered the apartment they came back to the bedroom and Penson went into the living room. Brooks and Smith made Deborah come out of the bedroom closet and Smith, who was holding a gun on James, said to Deborah, "Take off your clothes, bitch, I am going to fuck you." Brooks had a knife at that time and Smith handed the gun to Brooks. Smith then said, "Yes, mother fucker, I am going to fuck your wife right in front of your face" and proceeded to have sex with Deborah on the floor (T. Tr. 206). While this was going on, Brooks held the gun to James' head and demanded money. When James told him that Penson already had the money, Brooks called him a liar and hit him in the head several times with the end of the pistol. Brooks then made James get down on the floor and crawl while telling him, "Mother fucker, you are going to die, this is it, this is the day you are going to die." (T. Tr. 206-07). During this time, James stated that he could hear his sister in the living room pleading with Penson not to hurt her child.

After Smith finished raping Deborah and got up he said to her, "Hey, I want you to suck my dick and get a come off it." (T. Tr. 207-08). Deborah complied with Smith's demand and then she was raped by Brooks. Brooks first told her, "Suck it, bitch." After doing as he ordered, Deborah was then raped vaginally by Brooks. As Brooks was doing this to Deborah, Smith held the gun on James and said, "Tell your wife what kind of nigger you are. Tell her you ate shit, you punk mother fucker. You are a fag." Smith then hit James several times in the head with the gun (T. Tr. 208).

During this time Penson came back into the room. As Deborah exclaimed, "Jesus, Jesus", Penson said to her, "Jesus, he wasn't going to help you now, bitch. You are getting ready to die" (T. Tr. 208-09). Penson then commented that they were not going to leave any witnesses because he thought that James and Deborah would go to the police. Penson then went over to Deborah and forced her to commit fellatio on him at the same time that she was having anal intercourse with Brooks. James heard Penson tell Deborah, "Yes, bitch, if you bit it I am going to blow your head off." When Penson finished he told Deborah, "You don't even know how to get no head" and he then kicked her in the side of the head. After that, Smith came back over and said, "Yes I am going to get me some of this. I am going to fuck you in your ass, bitch." Smith then proceeded to have anal sex with Deborah. As this was happening, Penson came over to where James was lying face down on the floor, stepped on his buttocks and then urinated on James' back. Penson then took the pistol he was holding and pressed the barrel up against James' rectum while telling him, "I ought to blow your nuts right off you." (T. Tr. 209-10).

After Smith finished raping Deborah, Penson went over and raped her vaginally. Penson said to her, "You have got good titties and you have got good pussy but you don't know how to give no head." Penson then turned Deborah over and had anal intercourse with her. At the same time that Penson was having anal sex with Deborah, Smith came over and made her commit fellatio upon him. After Smith was finished, he came over to where James was and either urinated or dripped sperm on his back. At that time Brooks came back into the room while Penson left the room. Brooks threatened to kill James and hit him in the side of the head a couple of times with the pistol he was holding. Brooks then said to James, "Yes, I ought to fuck you in your ass, where is the grease at, mother fucker." James replied that he did not know where any grease was. Smith then got on top of James while holding a gun to the back of his head and tried to insert his

penis into James' rectum (T. Tr. 210-12; 215-16). After that, Brooks began raping Deborah again while at the same time sticking the barrel of the pistol he was holding up against James' testicles and telling him, "I'll blow your nuts off." (T. Tr. 212).

After that, Penson came back into the room and again stated his intention to leave no witnesses. Smith had gone back into the living room with Mary and James could hear her crying. James then heard Brooks say to Deborah, "Give me some more head" after which she was forced to commit fellatio on Brooks (T. Tr. 212). Penson then struck James several more times on the side of the head with the pistol and again threatened to kill him. After that, Penson once again forced Deborah to perform fellatio upon him. When asked why they were committing these acts, Penson indicated that he blamed James for a criminal charge of carrying a concealed weapon that he was facing (T. Tr. 212-13). At this point, James saw his sister go back to the bathroom with Smith and heard the shower cut on. Penson and Brooks then ordered Deborah to get on the bed with James and they forced her to perform fellatio upon James (T. Tr. 248). Deborah was then taken into the bathroom and forced to take a shower. While Deborah was in the shower, Penson again hit James in the head with the pistol.

After Deborah came out of the shower, she was told to lay face down on the bed with James. Penson then told Brooks to kill James and Deborah after which Penson and Smith left the room. Brooks then said, "Yes, this is it, mother fucker. You are going to die. You are going to die." Then, for some unexplained reason, Brooks said, "I couldn't kill you." Brooks then told them to count to two thousand and he left the apartment (T. Tr. 213-14).

At this point in James Jones' testimony all three defendants, by counsel, stipulated that none of the defendants was the spouse of James, Deborah or Mary Jones (T. Tr. 214-15).

James testified that the defendants took several items from the apartment, including his duffel bag, a cassette player, a flashlight, Deborah's identification cards, and some items they had recently purchased from Sears (T. Tr. 216). James also stated that he saw two guns and a knife in the possession of the defendants and that he did not consent nor did he hear Deborah consent to any of the sexual acts perpetrated upon them (T. Tr. 216-17). James further noted that he had no trouble seeing under the lighting conditions that existed in the apartment during the course of these acts and that he was one hundred percent positive that Steve Penson, Richard Brooks and John Albert Smith, Jr., were the three men in the apartment who committed the acts (T. Tr. 218-19).

On cross-examination, James was asked whether he ever heard his wife yell or scream during the incidents. James replied that Deborah did scream at one point and that Penson told her, "Bitch, you better shut up and you ain't going to start screaming or I am going to blow your fucking head off." (T. Tr. 251).

Dr. Don E. Gregory testified that he examined Deborah and Mary Jones in the early morning hours of August 4, 1984, sometime between 4:00 a.m. and 6:00 a.m., at Good Samaritan Hospital (T. Tr. 356). Dr. Gregory stated that his examination of Mary Jones revealed no obvious external signs of trauma and no physical problems except in the pelvic area where she had a long superficial laceration on the vulva. The laceration measured about one-half inch in length, was still fresh and oozing and was obviously less than four to six hours old (T. Tr. 357; 361).

When he examined Deborah Jones, Dr. Gregory noted that she was crying and very distraught. Deborah told him that she had been raped by several men. Dr. Gregory's physical examination of Deborah revealed numerous bruises over her body including five separate bruised areas over her upper chest and neck and two large bruised areas on her back. His pelvic examination of Deborah disclosed five separate one-

half centimeter lacerations scattered over the vulva and the internal genital area. In the rectal area there were two small lacerations noted in the skin over the entrance to the rectum. A specimen obtained from the vaginal wall noted the presence of non-motile sperm. Dr. Gregory stated that the presence of non-motile sperm indicated that it was deposited somewhere between one-half and four hours before (T. Tr. 357-59).

Dr. Gregory stated that his opinion, to a reasonable degree of medical certainty, was that both Deborah and Mary's injuries were consistent with forceful intercourse and their statements made to him that they had been raped. In Dr. Gregory's opinion, these injuries were inconsistent with consensual intercourse (T. Tr. 359-60).

Mary Jones testified that she had been sleeping in the living room of her brother's apartment during the early morning hours of August 4, 1984 when she was awakened by John Smith. Mary stated that she did not know Smith prior to that time but she was able to positively identify him in court (T. Tr. 389-91). Mary explained that a light which was shining through a living room window provided sufficient illumination to enable her to see things and people in the room (T. Tr. 391). Mary complied with Smith's demand that she remove her clothes. Smith then left the room and Penson came in. Although Mary did not know Penson beforehand, she positively identified him in court (T. Tr. 392). Mary begged Penson not to hurt her or her son and Penson asked her what she would do to keep that from happening. Mary told Penson she would do what he wanted and Penson told her to unzip his pants (T. Tr. 392). Mary stated that after she unzipped his pants, Penson ordered her to suck his penis and said, "If you bite me I will kill you." After complying with Penson's demand, Mary was ordered to lay on top of Penson and he proceeded to have vaginal intercourse with her. As she was lying on top of Penson, another man whom she could not see came up from behind and had anal intercourse with her (T. Tr. 392-93). When the other man finished raping her anally, he

went back into the bedroom. Penson then told her to lay face down and he had anal intercourse with her (T. Tr. 393). Mary then went into the bathroom and was getting ready to take a shower when Smith came in and said, "I am not finished with you yet." Smith brought her back into the living room and forced her to get down on her knees and commit fellatio on him. He then had vaginal and anal intercourse with her (T. Tr. 393-95). Smith then took Mary into the bathroom and forced her to take a shower while he watched (T. Tr. 395-96).

Mary further testified that she saw one of the men carrying a bag with him when they left and that some of her property was missing including her car keys, five dollars in cash and some clothes (T. Tr. 403-04). Mary stated that she was not able to positively identify Brooks as one of the men there but she was able to positively identify Penson and Smith because of the close face-to-face contact she had with them during the rapes and because of their close proximity during the rapes to the window which allowed the outside light to come in (T. Tr. 397-98; 426-28).

Ronald Brandenburg, an evidence technician with the Miami Valley Regional Crime Lab, testified with regard to some fingerprints which he was able to get from a fishbowl in the bedroom of the Jones apartment (T. Tr. 437-39). Detective Jim Locker, a latent print examiner with the Dayton Police Department, testified regarding his examination and comparison of the prints with the known prints of Steve Penson and stated his opinion that the prints lifted from the fishbowl were those of Steve Penson to the exclusion of all other persons (State's Exhibits 9 through 11; T. Tr. 447-50).

Dr. Carl M. Ferraro testified regarding his examination and treatment of James Jones at Good Samaritan Hospital on August 4, 1984. Dr. Ferraro stated that he saw James around 5:00 a.m. that morning and that James had approximately ten to twelve lacerations on the left side of the head ranging from a few millimeters to about one inch in length. Dr. Ferraro noted that he used 36 stitches to close the lacerations (T. Tr. 456-58).

Deborah Jones testified that in the early morning hours of August 4, 1984 she was rolling her hair in the bedroom of their apartment. She was using a mirror to roll her hair and the outside lights coupled with a candle and flashlight in the bedroom provided sufficient illumination to accomplish that task (T. Tr. 474-78). As she was doing that, she saw Penson come through the bedroom window with a gun in his hand. Deborah stated that Penson was cursing at James and mentioned something about James owing him money (T. Tr. 478-81). Deborah stated that she had known Penson previously and she identified him in court (T. Tr. 481-82). She also stated that she had never seen Brooks or Smith prior to this time (T. Tr. 482).

Deborah's testimony essentially corroborated that of her husband concerning the events that transpired in their bedroom. She stated that Smith forced her to take her robe off and threw her on the bed. Smith then raped her vaginally after which he forced his penis into her mouth. After Smith forced her to perform fellatio on him, he went over and helped the others beat on James. She stated that the defendants were making James watch what they were doing to her (T. Tr. 483-85).

After Smith left her, Brooks came over and made her commit fellatio on him, telling Deborah that he would not let them hurt her as long as she did what she was told. Brooks then made her get on top of him and had intercourse with her. While she was on top of Brooks, Penson kicked her in the head and then forced his penis into her mouth. After Brooks had intercourse with her, he made her commit fellatio on him. Brooks later came back over to Deborah and made her sit on top of him again with his penis in her vagina. While this was going on, Penson came back over and held a gun to her head while he inserted his penis into her rectum (T. Tr. 485-89). Deborah also observed Smith getting ready to insert

his penis into her husband's rectum but she could not tell whether Smith actually raped James (T. Tr. 489-90). Deborah later observed Penson urinating on James' back (T. Tr. 490-91). Eventually, Penson took her into the bathroom and forced her to shower after which he inserted his finger into her vagina. Penson then took her back into the bedroom and forced her to commit fellatio on her husband (T. Tr. 491-93). Brooks was told to kill her and James and put pillows over their heads as they laid face down on the bed. Brooks told them that he had to kill them but was unable to do so and left the apartment after telling them to count to 2,000 (T. Tr. 493-96). Deborah stated on cross-examination that she had no trouble identifying Brooks because she "was looking dead at that man's face when he was raping me" and knew without a doubt that he was the man (T. Tr. 528-29).

State's Exhibit 1, a certified copy of the termination entry in Case Number 75-CR-144, *State* v. *Steven Penson*, and State's Exhibit Number 2, a certified copy of the plea entry showing that Penson had pled guilty to Felonious Assault in Case Number 75-CR-144, were introduced into evidence through the testimony of Richard Horn, Deputy Clerk with the Montgomery County Court of Common Pleas (T. Tr. 180-82).

Officer Michael Tenore of the Dayton Police Department was called as a witness on behalf of John Smith. Officer Tenore spoke with Mary and Deborah Jones at Good Samaritan Hospital on the morning of the rapes. Mary had told him that someone had held a flashlight in her face and she could not see who else was in the house. Officer Tenore stated that Deborah did not give him a description or name of any assailant but she did agree with the description given to him by James Jones (T. Tr. 563-64).

Officer Tenore had testified for the State at the suppression hearing and he testified at that hearing about the procedures utilized when James and Deborah identified John Smith's picture out of a photospread (State's Exhibit 1; Supp. Tr. 12-16).

Officer Tenore also stated during the suppression hearing that Deborah and Mary were extremely upset at the hospital and he did not question them much but got most of his information from Mr. Jones (Supp. Tr. 26).

Detective Claudette Ison of the Dayton Police Department was called as a witness on behalf of Richard Brooks. Detective Ison stated that she sent pubic hair samples taken from each of the defendants to the Miami Valley Regional Crime Lab for analysis but was unable to testify to the results (T. Tr. 565-67).

Detective Ison testified for the State at the suppression hearing concerning the procedures utilized when Mary Jones picked John Smith's picture out of a photospread as one of her attackers (State's Exhibit 1; Supp. Tr. 28-29). She also described how James and Deborah Jones separately picked Richard Brooks' picture out of a photospread (State's Exhibit 3; Supp. Tr. 29-31; 47-48) and how James, Deborah and Mary Jones separately picked Penson's picture out of a photospread (State's Exhibit 2; Supp. Tr. 31-32; 61-63; 64-66).

John Smith testified in his own behalf, stating that he had never been to the Jones's apartment at 1947 Fairport Avenue and that he had never seen any of the Jones family until he saw them in court (T. Tr. 570-72).

Steven Penson testified in his own behalf, admitting that he knew James and Deborah Jones but denying any involvement in the crimes (T. Tr. 574-77; 581). Penson testified that he was at a girl friend's house from approximately 11:30 p.m. on August 3 to about 6:00 a.m. on August 4, 1984 (T. Tr. 578-80).

Richard Brooks testified in his own behalf likewise denying any involvement in the crimes. Brooks stated that he was at Penson's house on the night of August 3, 1984 and that he went to bed after Penson left at around 11:30 p.m. Brooks testified that he was awakened around 1:00 a.m. the next

morning by his sister Connie beating on the front door. After talking to Connie for a while, Brooks went back to bed and slept until sometime during the next afternoon (T. Tr. 587-89).

SUMMARY OF ARGUMENT

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court set standards for evaluating claims of ineffective assistance of counsel at trial. The standard adopted in *Strickland* provides a fair and logical framework for judging such claims at trial and would be equally well-suited for analyzing claims of ineffective assistance of counsel on a direct appeal as of right. The present case provides an opportunity to apply the *Strickland* standard in a case involving allegations of deficient performance on the part of court-appointed appellate counsel and also provides the opportunity to apply a single uniform standard in evaluating ineffective assistance of counsel claims on direct appeal without regard to whether counsel is retained or appointed.

This case also poses the question of whether a claim of ineffective assistance of appellate counsel can be subject to a harmless error analysis. A claim of ineffective assistance of court-appointed appellate counsel based upon counsel's refusal, after thorough examination of the record, to file what he considered to be a meritless brief, should be subject to analysis under the harmless error doctrine of *Chapman* v. *California*, 386 U.S. 18 (1967).

ARGUMENT

I. THE PETITIONER CANNOT ESTABLISH HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHERE HE HAS FAILED TO POINT TO SPECIFIC ERRORS OR OMISSIONS MADE BY HIS APPELLATE COUNSEL WHICH SHOW, IN LIGHT OF ALL THE CIRCUMSTANCES, THAT HIS APPELLATE COUNSEL'S PEFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND WHICH ESTABLISH A REASONABLE PROBABILITY THAT, BUT FOR HIS APPELLATE COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

The Petitioner argues that he was denied equal protection, due process and the effective assistance of counsel on direct appeal because his appellate counsel failed to strictly comply with the requirements set forth by this Honorable Court in *Anders* v. *California*, 386 U.S. 738 (1967). Petitioner further argues that his appellate counsel's failure to file a brief constituted a constructive denial of counsel with the result that prejudice need not be shown.

In *Anders*, this Court held that when an attorney appointed to represent an indigent defendant on direct appeal finds his client's case to be wholly frivolous after a conscientious examination of the record, he should so advise the court and request permission to withdraw from the case. The Court noted that the request to withdraw should be accompanied by a brief referring to anything in the record that might arguably support the appeal and that a copy of the brief should be furnished to the defendant in order to allow him to raise any points he might choose. The appellate court would then undertake a full examination of the record to determine whether the case was wholly frivolous. If the court then found any points arguable on their merits, it should afford the

indigent defendant the assistance of counsel to argue the appeal. 386 U.S. at 744. The Court noted that this procedure was designed to afford an indigent defendant opportunities on appeal that were enjoyed by defendants with retained counsel and further stated that "such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled." *Id.*, at 745.

Thus, the *Anders* procedures established a "prophylactic framework" that was designed to protect the constitutional requirements of substantial equality and fair process. *Pennsylvania* v. *Finley*, 481 U.S. ____, 107 S.Ct. 1990, 1993 (1987). It is respectfully submitted that the *Anders* procedures are not an end unto themselves, resolutely inflexible, but are merely a means of achieving the constitutional commands of equality and fundamental fairness in the criminal appellate process. While the goal sought to be achieved by the *Anders* procedures is the substantial equality of representation of indigent and non-indigent defendants on appeal, in actual practice *Anders* has created a dual standard of representation of criminal defendants on direct appeal. Appointed counsel on appeal often find it less burdensome to file a brief raising one or two frivolous issues for the appellate court to digest rather than attempting to comply with the *Anders* procedures in withdrawing from an appeal which they consider to be without merit. Such concerns are reflected in the opinion written by Justice (then Judge) Stevens in *Nickols* v. *Gagnon*, 454 F.2d 467, 472 (7th Cir. 1971), *cert. denied* 408 U.S. 925 (1972), where he stated:

> If retained counsel are effective advocates and attentive to their professional responsibilities, they will seldom advance contentions that are groundless. The mere fact that such a lawyer is making an argument should indicate that it has sufficient substance to merit the court's attention. If appointed counsel were obligated in every case to make arguments that amount to little more than meaningless charades, a subtle but invidious distinction between appointed and retained counsel might develop. The indigent, unlike the nonindigent defendant, would lose the benefit of retained counsel's implicit representation to the court that he believes in the legal substantiality of the contentions advanced.
>
> (Footnotes omitted).

Anders was decided seventeen years before this Court set forth the current standards for judging the effectiveness of counsel in *United States* v. *Cronic*, 466 U.S. 648 (1984) and *Strickland* v. *Washington*, 466 U.S. 668 (1984) and eighteen years before this Court held that due process of law guarantees a criminal defendant the effective assistance of counsel on a first appeal as of right in *Evitts* v. *Lucey*, 469 U.S. 387 (1985).

In *Strickland* v. *Washington*, supra, this Court held that where a convicted defendant claims that his trial counsel's performance was so deficient as to require reversal of his conviction, he must first show that, in light of all the circumstances, counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687-88. In this particular regard, this Court noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. In addition, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 689-94. Thus, under *Strickland*, the test for ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice, the same as in Ohio under *State* v. *Lytle*, 48 Ohio St. 2d 391 (1976).

In *United States* v. *Cronic*, supra, this Honorable Court noted that some situations do exist where prejudice need not be shown by an accused, the most obvious of which being the

complete denial of counsel or the denial of counsel at a critical stage of trial. 466 U.S. at p. 658-59 and n.25. This Court cited *Davis* v. *Alaska*, 415 U.S. 308 (1974), where the accused was denied the right to effective cross-examination, and *Powell* v. *Alabama*, 287 U.S. 45 (1932), "a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial," as being representative of situations where prejudice need not be proven by the defendant. *Id.*, at p. 659-61. But this Court also went on to state that "[a]part from circumstances of that magnitude, however, *there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt*. See *Strickland* v. *Washington*, 466 U.S. at 693-696, 104 S.Ct. at 2067-2069." *Id.*, at p. 659-60, n.26 (Emphasis added; citations omitted). This Court also noted that, in the absence of extraordinary circumstances such as those found in the *Davis* and *Powell* cases, in its evaluation of ineffective assistance of counsel claims:

> [W]e begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation.*

Id., at p. 658 (Emphasis added; citations and footnotes omitted).

In *Evitts* v. *Lucey*, supra, this Court decided that a first appeal as of right "is not adjudicated in accord with due process of law if the appellant does not have the effective

assistance of an attorney." 469 U.S. at 396 (Footnote omitted). In *Evitts* this Court noted that the district court's finding that the petitioner received ineffective assistance of counsel on appeal was uncontested by the parties. Thus, the Court found it unnecessary to "decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel." *Id.* at p. 392. However, in *Smith* v. *Murray*, 477 U.S. ____, 106 S.Ct. 2661 (1986), this Court applied the test of *Strickland* v. *Washington*, supra, to a claim involving the ineffective assistance of appellate counsel. In *Smith* v. *Murray*, the Court held that the habeas corpus petitioner had defaulted his underlying constitutional claim as to the admission of a psychiatrist's testimony at the sentencing phase of his capital murder trial since his appellate counsel had not raised the issue on direct appeal as required by Virginia law. The Court stated: "Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)". *Smith*, supra at p. 2667. The Court then went on to elaborate:

> It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willlingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as *Strickland* v. *Washington* made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S., at 689, 104 S.Ct., at 2065. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Piles' testimony fell well within the

> "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. *Id.*, at 690, 104 S.Ct., at 2066.

Id., at p. 2667.

Thus, the Respondent would respectfully submit that the *Strickland* test for evaluating claims involving the effectiveness of counsel at the trial stage applies equally to claims involving the effectiveness of counsel on a first appeal as of right. Accord, *Lockhart* v. *McCotter*, 782 F.2d 1275, 1283 (5th Cir. 1986), *cert. denied* ____ U.S. ____, 93 L.Ed. 2d 827 (1987); *Griffin* v. *West*, 791 F.2d 1578, 1582-83 (10th Cir. 1986).

The Petitioner relies upon *Evitts*, *Strickland* and *Cronic* and argues that prejudice should be presumed in his case because the circumstances surrounding his appeal amounted to a constructive denial of counsel. In *Strickland*, the Court noted that prejudice is properly presumed in cases of actual denial of counsel or where there is state interference with counsel's assistance to his client. The Court also noted that one type of actual ineffectiveness claim served to invoke "a similar, though more limited, presumption of prejudice." 466 U.S. at 692. The Court cited *Cuyler* v. *Sullivan*, 446 U.S. 335, 345-50 (1980), as a case where prejudice would be presumed only if the defendant could demonstrate that his counsel actively represented conflicting interests and that such actual conflict of interest adversely affected his lawyer's performance. *Id.* The *Strickland* Court then went on to note that "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." 466 U.S. at 693.

In the present case, the record shows that on January 8, 1985, Douglas Shaeffer was appointed to represent the Petitioner on his direct appeal to the Court of Appeals of Montgomery County, Ohio. Pursuant to Mr. Shaeffer's request, all

of the proceedings relating to Petitioner's trial were transcribed and made a part of the record on appeal. Once the complete record was filed in the court of appeals, Mr. Shaeffer was granted several extensions of time by the court of appeals in which to file a brief on behalf of the Petitioner. On June 2, 1986, Mr. Shaeffer filed a Certification of Meritless Appeal certifying to the court of appeals that he had carefully reviewed the record on appeal and had found no errors requiring reversal of the Petitioner's jury trial convictions and/or the trial court's sentence in the case and moved to withdraw as counsel of record on the appeal (J.A. 35-36).

It has not been suggested in this case that Mr. Shaeffer was laboring under any sort of conflict of interest nor has it been suggested that there was any state interference with Mr. Shaeffer's handling of the appeal. Thus, the Respondent would respectfully submit that this case, like the situations presented in *Strickland* and *Cronic*, is a case where prejudice must be demonstrated by the Petitioner and is not a case where prejudice should be presumed. The current case, where it is alleged that appointed counsel and the appellate court failed to strictly comply with *Anders* procedures, should be treated like the actual ineffectiveness of counsel case as set forth in *Strickland*. In *Anders*, the Court established a procedural mechanism which was designed to assist in achieving the goal of substantial equality and fundamental fairness in the criminal appellate process. These goals would be best achieved by applying a single, uniform standard for judging the effectiveness of counsel in all criminal appeals as of right, regardless of whether counsel is appointed or retained. Since all criminal defendants, whether represented by appointed or retained counsel, are entitled to the effective assistance of counsel on a direct appeal as of right, *Evitts*, supra, 469 U.S. at 395-96, there is no logical reason for applying a different standard for judging the effectiveness of an attorney on appeal based solely upon his status as appointed rather than retained. The application of the *Strickland* standard to all such appeals would be readily workable in the appellate context

because the reviewing court would have the benefit of a fully developed trial record before it which would enable it to evaluate a claim of ineffective assistance just as the Court was able to do in *Strickland*. 466 U.S. at 698-701. To ignore this trial record in evaluating such a claim, as the Petitioner would have the Court do in this case, would be to ignore the fact that " '[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote *the ultimate objective that the guilty be convicted and the innocent go free.*' " *Kimmelman* v. *Morrison*, 477 U.S. ____, 106 S.Ct. 2574, 2594 (1986) (Powell, J., Concurring), quoting *Evitts* v. *Lucey*, supra, 469 U.S. at 394 and *Herring* v. *New York*, 422 U.S. 853, 862 (1975) (emphasis in the former). As Justice Powell went on to note in *Kimmelman*, "[t]he right to effective assistance of counsel flows logically from this premise. But it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall." *Id.*, at 2595.

Clearly, due process of law entitled the Petitioner to the effective assistance of counsel on a first appeal as of right. *Evitts* v. *Lucy*, supra, 469 U.S. at 396. Just as clearly, however, Petitioner was not entitled to compel his court appointed appellate counsel to press nonfrivolous points requested by Petitioner when counsel, as a matter of professional judgment, decided not to press those points. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). In the instant case, Petitioner's court appointed appellate counsel clearly did, according to his Certification of Meritless Appeal (J.A., p. 35-36), conduct a careful examination of the record on appeal and found no errors justifying reversal or modification of Petitioner's conviction and sentence. In light of the foregoing, it is clear that Petitioner's court appointed appellate counsel did render some representation to Petitioner, and thus the real issue in the instant cause involves the effectiveness of the representation rendered by Petitioner's court appointed appellate

counsel, and not whether Petitioner was represented by counsel at all.

Under the *Strickland* test, Petitioner has clearly failed to demonstrate that he was prejudiced by the manner in which his first appeal as of right was handled. Noticeably absent from Petitioner's Petition for Writ of Certiorari or his Brief is even an attempt by Petitioner to point to any error in the trial record which, but for appellate counsel's failure to raise, would have resulted in a reasonable probability that the outcome of the proceeding (i.e. appeal) would have been otherwise. The Respondent would suggest that this amounts to a tacit admission by the Petitioner that he has suffered no prejudice in this case. Regardless of which attorney may have represented him in the appeal of his conviction, at some point in time that attorney would have to point to specific errors in the record in order to obtain further relief for the Petitioner in this case. The record herein shows that the Petitioner obtained the same result from his appeal as did his co-defendants (Brooks and Smith) and further shows, upon careful examination, that he is entitled to no additional relief. The record in the instant case reveals that the evidence against the Petitioner was overwhelming. Detective Ison testified at the suppression hearing that all three of the victims (James, Deborah and Mary Jones) separately picked Petitioner's picture out of the photospread (State's Exhibit 2) as one of the perpetrators of the instant offenses (Supp. Tr. 31-32; 61-63; 64-66). Moreover, both James and Deborah Jones testified that they had known the Petitioner previously (Supp. Tr. 104; 126-31; T. Tr. 197-98; 481-82). In addition, Petitioner's fingerprints were discovered in the bedroom of the Jones' apartment (T. Tr. 437-39; 447-50). Finally, it should be noted that the evidence adduced at trial is generally uncontradicted and unrefuted inasmuch as the theory of defense presented by all of the Defendants was basically one of denial and mistaken identification.

Based upon the record in the case *sub judice*, as applied against the stringent standard for judging the effectiveness of

counsel set forth in *Strickland* v. *Washington*, supra, and *Smith* v. *Murray*, supra, it is clear that the Montgomery County Court of Appeals was correct in its decision that Petitioner suffered no prejudice by his appellate counsel's filing of an *Anders* brief or by the appellate court's handling and disposition of the appeal.

II. AN ALLEGED CONSTITUTIONAL VIOLATION WHICH IS BASED UPON THE FILING OF AN INADEQUATE *ANDERS* BRIEF BY COURT-APPOINTED COUNSEL ON DIRECT APPEAL IS SUBJECT TO HARMLESS ERROR ANALYSIS PURSUANT TO *CHAPMAN* V. *CALIFORNIA*, 386 U.S. 18 (1967).

Assuming *arguendo* that a constitutional violation occurred in the handling of the Petitioner's direct appeal, Respondent would strongly contend that a review of the record in this case clearly establishes that any such error was harmless beyond a reasonable doubt. In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court held that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the basis of the entire record, that the constitutional error was harmless beyond a reasonable doubt. Unlike the *Strickland* test, of course, the state has the burden of proof to show that a constitutional violation is harmless and the state must prove its burden beyond a reasonable doubt.

In this case, the court of appeals held, after a thorough examination of the trial record, that the Petitioner suffered no prejudice in the handling of his appeal (J.A., p. 40-41). Such a finding is the clear equivalent of a holding that any error which occurred in the Petitioner's appeal was indeed harmless. Thus, the critical question for this Court to decide is whether or not harmless error analysis is appropriate in a case such as this. The recent decisions of this Court offer strong support for the proposition that harmless error analysis

is appropriate in a case involving an alleged Sixth Amendment violation of the right to counsel on direct appeal. As previously noted, this is *not* a case where no counsel was appointed to represent the Petitioner on appeal. Petitioner's appointed counsel acted to ensure that the complete record of the proceedings in the trial court was transcribed and made a part of the record on appeal. This enabled the court of appeals to fully examine the record "to determine whether the defendant was accorded a fair trial and whether any grave or prejudicial errors occurred therein." (J.A., p. 40).

In *Delaware* v. *Van Arsdall*, 475 U.S. ____, 106 S.Ct. 1431 (1986), the Court refused to apply a *Strickland* type outcome determinative prejudice test to a confrontation clause violation, noting that:

> [w]hile some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, see, e.g., *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) (ineffective assistance of counsel), the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.

106 S.Ct. at 1436.

Although the Court refused to apply a *Strickland* type prejudice test in *Van Arsdall*, it did hold that the confrontation clause violation was subject to harmless error analysis.

In *Rose* v. *Clark*, 478 U.S. ____, 106 S.Ct. 3101 (1986), the Court held that a jury instruction which erroneously shifted the burden of proof on the issue of malice in violation of the *Sandstrom* rule (*Sandstrom* v. *Montana*, 442 U.S. 510 (1979)) was subject to harmless error analysis. In its discussion on the harmless error doctrine, the Court noted a variety of situations where the harmless error rule had been applied, e.g., *Rushen* v. *Spain*, 464 U.S. 114, 118 (1983) (*per curiam*)

(denial of right to be present at trial); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); and *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel). 106 S.Ct. at 3105. The Court noted in *Clark* that harmless error analysis presupposes a trial at which the defendant is represented by counsel before an impartial adjudicator and is allowed to present evidence and argument. While the Court acknowledged that there are some errors, such as those which abort the basic trial process or deny it altogether, which can never be harmless, these errors are the exception and not the rule. *Id.*, at 3106 and n.6. The Court then went on to state:

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. *Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.* As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."

Id., at 3106-07 (emphasis added; citations omitted).

In holding that the *Sandstrom* error did not preclude the application of the harmless error doctrine, the Court reasoned:

> Unlike errors such as judicial bias or denial of counsel, *the error in this case did not affect the composition of the record*. Evaluation of whether the error prejudiced respondent thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. *Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case.*

106 S.Ct. at 3107, n.7 (emphasis added; citations omitted).

This Court is faced with precisely the same situation in the case at hand. With the aid of a fully developed trial record before it, there is no inherent difficulty for this Court in determining the presence or absence of prejudice in this case. Therefore, the Respondent would respectfully contend that this is indeed a proper case for the application of the harmless error doctrine and that, when the doctrine is applied to the record in this case, it is clear that the alleged constitutional violation is harmless beyond a reasonable doubt.

CONCLUSION

For the stated reasons, the Respondent, State of Ohio, requests that the judgment of the Court of Appeals of Montgomery County, Ohio be affirmed.

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney
Montgomery County, Ohio
Montgomery Cty. Courts Bldg.
41 N. Perry Street
Suite 300
Dayton, Ohio 45402
(513) 225-5757

By MARK B. ROBINETTE
Special Assistant
Prosecuting Attorney
20 E. Tabb Street
Suite 101
Petersburg, Virginia 23803
(804) 861-8899

COUNSEL OF RECORD FOR RESPONDENT

No. 87-6116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STEVEN ANTHONY PENSON,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Montgomery County, Ohio

REPLY BRIEF FOR PETITIONER

RANDALL M. DANA
Ohio Public Defender

GREGORY L. AYERS
Chief Counsel
Counsel of Record

DAVID C. STEBBINS
Senior Assistant
State Public Defender

GEORGE A. LYONS
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: (614) 466-5394
Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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ARGUMENT

I. BECAUSE THE OHIO COURT OF APPEALS DETERMINED THAT PENSON'S APPEAL WAS NONFRIVOLOUS, IT WAS REQUIRED TO APPOINT COUNSEL TO PURSUE HIS APPEAL AND DIRECT COUNSEL TO PREPARE AN ADVOCATE'S BRIEF BEFORE DECIDING THE MERITS OF THE APPEAL.

Noticeably absent from Respondent State of Ohio's (hereafter State) brief is any citation to or discussion of the precedents of this Court mandating the right to counsel on direct appeal. *See Douglas* v. *California*, 372 U.S. 353 (1963); *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *see also* discussion of these cases in Brief For Petitioner (hereafter Br. for Pet.) 11-12. The State also fails to mention or discuss the specific facts of *Anders* v. *California*, 386 U.S. 738 (1967), where counsel similarly withdrew from Anders' appeal after concluding it had no merit, without filing a brief with the court. *See* discussion of *Anders'* facts in Br. for Pet. 13.

The State does acknowledge that the *Anders* procedures were designed to protect the constitutional requirements of substantial equality and fair process for indigent defendants on direct appeal. The State then disparages *Anders* by asserting that "in actual practice *Anders* has created a dual standard of representation of criminal defendants on appeal." Brief for Respondent (hereafter Br. for Resp.) 16. Rather than moving to withdraw per the *Anders* procedures in a frivolous appeal, the State contends, appointed counsel instead often files a "brief raising one or two frivolous issues for the appellate court to digest." *Id.* Thus, the State suggests that *Anders* causes appointed counsel to make frivolous arguments and provides the indigent defendant with more than he is entitled.

The State offers no evidence or authority to support this assertion. Indeed, the Ohio experience appears to be to the contrary. See cases cited in Br. for Pet. 42, fn. 11, and the *Amicus Curiae* brief of the Ohio Association of Criminal Defense Lawyers 4-17, where counsel moved to withdraw without raising any issues. Actually, it is retained counsel that

seldom files a "no merit" brief. *McCoy* v. *Court of Appeals of Wisconsin*, ___ U.S. ___, 100, L.Ed. 2d 440, 453 (1988).

In any event, the State's assertion misses the point of what occurred here. The Ohio Court of Appeals expressly found that Penson's appeal was nonfrivolous and contained arguable, nonfrivolous issues. *See* Joint Appendix (hereafter J.A.) 41. Therefore, under *Anders*, 386 U.S. at 744, the Court was constitutionally obligated to provide Penson with counsel who would file a brief and argue his appeal.

Moreover, any doubts about the wisdom of the *Anders* decision or procedures were resolved by this Court's recent decision in *McCoy* v. *Court of Appeals of Wisconsin*, 100 L.Ed. 2d at 440. Reaffirming *Anders*, *McCoy* held that when appellate counsel represents the appeal is frivolous and seeks to withdraw, the court must make two determinations to satisfy federal constitutional concerns:

> "First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous."

Id. at 455. These critical determinations cannot be made on the mere statement by counsel that the appeal is frivolous. *Id.* at 454. Thus, *McCoy* reaffirmed *Anders'* requirement that counsel's motion to withdraw be accompanied by "a brief referring to anything in the record that might arguably support the appeal." *Id.* at 454. This will "provide the court with sufficient guidance to make sure that counsel's appraisal of the case is correct," *id.* at 453-54 n.11, and assure that the defendant's constitutional rights are "scrupulously honored." *Id.* at 456. In the instant case, counsel neither concluded the appeal was frivolous nor submitted anything to demonstrate that he had diligently searched the record for arguable errors. *See* J.A. 35. As a result, Penson's constitutional rights to due process, equal protection and effective assistance of counsel were not "scrupulously honored" by the Ohio Court of Appeals.

More importantly, *McCoy* reaffirmed *Anders'* requirement that counsel be appointed to prepare an advocate's brief where, as here, the court concludes that there are nonfrivolous issues to be raised. *Id.* at 457. Because the Ohio Court of Appeals refused to do so, despite Penson's request for new counsel, Penson was denied the benefit of what wealthy defendants could purchase—an attorney who would brief and argue arguable, nonfrivolous claims that would be decided by that court.[1] Penson was therefore denied his Fourteenth Amendment rights to substantial equality with non-indigent defendants and fair procedure on appeal.

II. APPLICATION OF A *STRICKLAND* V. *WASHINGTON*, 466 U.S. 668 (1984), "DEFICIENT PERFORMANCE" STANDARD REQUIRING A SHOWING OF PREJUDICE IS INAPPROPRIATE WHERE COUNSEL DOES NOT FILE AN ADVOCATE'S BRIEF IN A NONFRIVOLOUS APPEAL. IN THIS SITUATION, COUNSEL PROVIDES NO ASSISTANCE, THE ACCUSED IS DENIED COUNSEL, AND PREJUDICE MUST BE PRESUMED.

The State contends that Penson's claim of ineffective assistance of appellate counsel should be judged under *Strickland* v. *Washington's*, 466 U.S. 668 (1984), "deficient performance" standard. Br. for Resp. 21. While this standard may apply in the normal appeal where counsel files a brief and argues issues, see, e.g., *Smith* v. *Murray*, 477 U.S. 527 (1986), it is inappropriate where, as in this case, counsel does not file an advocate's brief in a nonfrivolous appeal. In this situation, there is effectively a denial of counsel as there is "no performance" by counsel or assistance provided to the defendant. *Strickland*, 466 U.S. at 692, and *United States* v. *Cronic*, 466 U.S. 648, 659

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[1] Ohio Law requires that the Court of Appeals pass upon each error assigned and briefed, and state the reasons for its decision. Rule 12(A), Ohio Rules of Appellate Procedure.

(1984), recognized that if counsel is denied or fails to participate in the adversarial process, prejudice is presumed.

While the State concedes that a presumption of prejudice applies where there is a complete denial of counsel or denial of counsel at a critical stage of trial, the State contends the denial here is not of that magnitude. Essentially, the State contends that Penson was not denied counsel because his appellate counsel provided "some representation." Br. for Resp. 22. The State's argument is frivolous.

This Court in *Strickland*, 466 U.S. at 685, recognized that counsel's presence and participation in the adversarial trial process was critical to the ability of the adversarial process to produce just results. Similarly, counsel's presence and participation as an advocate in the adversarial appellate process is essential to an adequate and effective appeal. *Evitts* v. *Lucey*, 469 U.S. 387 (1985). Conversely, counsel's absence or failure to participate in the adversarial process on appeal undermines the reliability of that process. *Cf. Strickland*, 466 U.S. at 685-86; *Cronic*, 466 U.S. at 658-59. A defendant simply cannot receive an adequate and effective review of his conviction unless counsel participates in that process as an advocate. An advocate *advocates*. An attorney who files no brief and withdraws from a nonfrivolous appeal, as Penson's counsel did, has not advocated anything—except that the appeal is without merit. Such conduct is not even constitutionally sufficient where the appeal is allegedly frivolous. *Anders*, 386 U.S. at 744; *McCoy*, 100 L.Ed. 2d at 454.

Thus, an advocate's brief is essential to a nonfrivolous appeal. *See* discussion of importance of brief in Br. for Pet. 20-21. Not even an "*Anders* brief" can serve as a substitute. *McCoy*, 100 L.Ed. 2d at 456. As this Court recently said in *McCoy*, 100 L.Ed. 2d at 452, "counsel for an appellant cannot serve the client's interest without asserting specific grounds for reversal." Since that did not occur here, Penson was effectively denied counsel on appeal.

The State concedes that Penson was entitled to the effective assistance of counsel on direct appeal. The State further points out that *Evitts*, 469 U.S. at 392, did not decide appropriate standards for judging claims of ineffective assistance of appellate counsel. However, *Evitts*, *id.* at 394, did reiterate that counsel must file a brief, citing *Swenson*, 386 U.S. at 258, and that an appellate court's judgment is unconstitutional without it, citing *Anders*, 386 U.S. at 738. Nevertheless, the State surprisingly asserts that Penson "was not entitled to compel his court appointed appellate counsel to press nonfrivolous points requested by [Penson] when counsel, as a matter of professional judgment, decided not to press those points," citing *Jones* v. *Barnes*, 463 U.S. 747, 751 (1983). Br. for Resp. 22. There is, of course, no evidence of any such communication between Penson and his appellate counsel as in *Jones*.

In essence, the State flatly argues that appointed counsel may totally abandon a nonfrivolous appeal. *Jones*, *id.* at 749, does not so hold. To the contrary, *Jones* held that counsel alone, in the exercise of his professional judgment, may choose which nonfrivolous issues to argue on appeal. The Court found this to be consistent with the vigorous and effective advocacy required by *Anders*. *Id.* at 754. There is no advocacy, much less vigorous and effective advocacy, when appellate counsel refuses to file a brief and withdraws from a nonfrivolous appeal. No reasonable professional judgment can support such a decision. *Laffosse* v. *Walters*, 585 F. Supp. 1209, 1213 (S.D.N.Y. 1984).

Smith v. *Murray*, 477 U.S. at 527, cited by the State, see Br. for Resp. 19, is consistent with *Jones* and supports this conclusion. In *Smith*, appellate counsel had filed a brief and asserted errors on appeal. Smith claimed counsel was ineffective because he failed to assert a particular claim. This Court applied a *Strickland* "deficient performance" standard because counsel had advocated other errors in his brief. *Id.* at 535-36. Thus, the "deficient performance" standard may be applicable in the normal appeal where counsel files a brief and argues

issues; however, it is totally inappropriate where, as here, counsel does not file an advocate's brief in a nonfrivolous appeal, but instead withdraws. *Cf. Cannon* v. *Berry*, 727 F. 2d 1020 (11th Cir. 1984); *Freels* v. *Hills*, 843 F. 2d 958 (6th Cir. 1988); *Jenkins* v. *Coombe*, 821 F. 2d 158 (2nd Cir. 1987), *cert. denied*, ____ U.S. ____, 98 L.Ed 2d 655 (1988), discussed in Br. for Pet. 23-25, 30. The "deficient performance" test makes sense only when counsel participates in the adversary process and engages in a performance, i.e., files a brief.

Appellate counsel's conduct in this case can hardly be considered the effective assistance or advocacy required by the Sixth and Fourteenth Amendments. After facilitating transmission of the trial court record to the Ohio Court of Appeals, the record indicates that counsel took only one further action. Counsel filed a "Certification of Meritless Appeal" and Motion to Withdraw certifying that there were no errors requiring reversal of Penson's convictions or sentences. (J.A. 35). The Sixth Circuit addressed an identical situation in *Freels* v. *Hills*, 843 F. 2d 958 (6th Cir. 1988). Chief Judge Engel's analysis is relevant:

> As close as counsel's brief comes to advocacy is the unsupported representation that "upon careful review of the docket and transcript, [he] concludes that the trial court committed no error prejudicial to the defendant." In short, we are wholly unable to find that court-appointed counsel for Freels did more than or indeed even as much as was done by court-appointed counsel in *Anders*. In *Anders*, it at least appea[r]s that appointed counsel represented to the appellate court that he had visited and explained his views and opinions to Mr. Anders and subsequently notified the court of appeals that Anders wished to file a brief on his own behalf. *Anders*, 386 U.S. at 739, 87 S.Ct. at 1397. Even this amount of effort was found insufficient to fulfill the constitutional mandate in *Anders*, for the Court there emphasized that counsel's bare no-merit conclusion was not an adequate substitute for the petitioner's right to full appellate review.

Id. at 962. Additionally, in the instant case there is no evidence in the record that appellate counsel even communicated or

consulted with Penson concerning the appeal. Appellate counsel does have a duty to consult with his client concerning the appeal. *See* STANDARDS RELATING TO CRIMINAL APPEALS, Standard 21-3.2 (1986); *McCoy*, 100 L.Ed. 2d at 453 (". . . [I]n advising the client as to prospects for success, counsel must consistently serve the client's interest to the best of his or her ability"). Thus, Penson received less assistance from his appellate counsel than did Anders.

The State argues that *Strickland's* presumption of prejudice analysis does not apply because there was no state interference with counsel's assistance, or conflict of interest by counsel. *See, e.g., Brooks* v. *Tennessee*, 406 U.S. 605 (1972); *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). The State again fails to recognize that there was a denial of counsel here by the State. Moreover, it was the *state* Court of Appeals, that had an affirmative duty to provide counsel, that denied him counsel. The constitutional violation is more egregious here than in a conflict situation or the usual state interference case. *Cf. Holloway*, 435 U.S. at 476-81; *Brooks*, 406 U.S. at 606. In those cases, some assistance is provided the defendant, albeit impaired in a constitutional sense. Here, Penson received *no assistance*. The constitutional result in either situation is the same: counsel's assistance is presumptively ineffective and reversal is required.

The State further argues that the *Strickland* "deficient performance" standard would be readily workable on appeal "because the reviewing court would have the benefit of a fully developed trial record before it which would enable it to evaluate a claim of ineffective assistance of appellate counsel just as the Court was able to do in *Strickland*." Br. for Resp. 21-22. The State confuses the processes by which claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel must be judged. Counsel's performance at trial can normally be judged because there is a "fully developed record" of his performance. For example, in *Strickland*, 466 U.S. at 672-74, 699-700, there were sufficient facts as to trial counsel's

performance to make a judgment regarding his effectiveness. On the other hand, where counsel files no brief on appeal, there is "no record" of any performance to evaluate. Where trial counsel refuses to participate at trial, prejudice is presumed. *Martin* v. *Rose*, 744 F. 2d 1245 (6th Cir. 1984). The result should be no different on appeal. It is unrealistic to suggest that a performance or deficiency yardstick be used to judge or measure that which does not exist.

What the State suggests is incredibly frightening. It suggests that if there was sufficient evidence to support the guilty verdict, then counsel's withdrawal from a nonfrivolous appeal, and the appellate court's affirmance of the conviction, is not prejudicial. Br. for Resp. 21-23. In other words, if the trial record shows sufficient evidence of guilt, an accused can be denied counsel on appeal unless he can show he would have won on appeal had he had counsel. This Court's decisions in *Douglas*, 372 U.S. at 358, *Swenson*, 386 U.S. at 259, *Anders*, 386 U.S. at 744, *Entsminger* v. *Iowa*, 386 U.S. 748 (1967), and *McCoy*, 100 L.Ed. 2d at 440, demonstrate that counsel's assistance on appeal is essential to adequate and effective review. Unless we are prepared to dismantle our state systems of appellate review, and reconsider or wholly abandon the reasoning of these decisions, a minimum performance by counsel must be guaranteed. The right to effective assistance of counsel on appeal further protects the fairness of the criminal justice system by insuring that all defendants are guaranteed a fair trial.

Vindication of Penson's right to effective assistance of counsel on appeal is not a windfall as the State suggests. *See* Br. for Resp. 22. As this Court said in *Kimmelman* v. *Morrison*, 477 U.S. 365, 380 (1986):

> . . . *we have never intimated that the right to counsel is conditioned upon actual innocence*. The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt. (Footnote omitted) (Emphasis added).

The State further contends that Penson has failed to demonstrate prejudice from the Ohio Court of Appeals' handling of his case, i.e., specific errors in the trial record that would have been successful had they been raised on appeal. Br. for Resp. 23. Those errors are not properly before this Court because they were not raised by Penson's appellate counsel. Thus, it would not be appropriate for this court to pass on them or engage in a harmless error analysis when they have not been argued in or passed upon by the lower courts. *Rose* v. *Clark*, 478 U.S. ____, 92 L.Ed. 2d 460, 474. Nonetheless, there were issues that appellate counsel could have raised on Penson's behalf, in addition to those raised by his co-defendants, Richard Brooks and John Smith.

Since the State has made this argument, the following are some additional issues Penson's appellate counsel could have raised. The trial court erred in convicting and sentencing Penson for both the offense of having a weapon under disability, Ohio Revised Code Annotated (Page) (hereafter O.R.C.) § 2923.13(A)(2), and a firearm specification, O.R.C. § 2929.71. *See* J.A. 33-34. The firearm specification, O.R.C. § 2929.71, is arguably a felony offense under Ohio law, see O.R.C. §§ 2901.03(A), 2901.02(E), since it provides a prohibition and a penalty of three years imprisonment, must be alleged in the indictment, O.R.C. § 2941.141, and must be proven beyond a reasonable doubt. *State* v. *Boyce* (1985), 21 Ohio App. 3d 153, 486 N.E. 2d 1246; *Cf. McMillan* v. *Pennsylvania*, 477 U.S. 79, 87-88 (1986); *United States* v. *Brewer*, 841 F. 2d 667 (6th Cir. 1988). Ohio's multiple counts statute, O.R.C. § 2941.25, prohibits conviction for more than one offense where the same conduct constitutes two or more offenses but there is no separate animus for commission of each offense. *State* v. *Bickerstaff* (1984), 10 Ohio St. 3d 62, 65-66, 461 N.E. 2d 892. In light of O.R.C. § 2941.25, Penson's convictions for both offenses would also violate the double jeopardy provisions of the state and federal constitutions. *Missouri* v. *Hunter*, 459 U.S. 359 (1983).

The trial court also erred in failing to dismiss, see Trial Transcript (hereafter Tr.) 547-552, the charge of having a weapon under disability, O.R.C. § 2923.13(A)(2), because the state failed to present any evidence to establish beyond a reasonable doubt that Penson possessed a firearm as defined in O.R.C. § 2923.11 ("any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant"). Proof of mere possession of a gun, *Boyce*, 21 Ohio App. 3d at 153, 486 N.E. 2d 1246, or making threats with a gun is insufficient. *State* v. *Gaines* (Jan. 19, 1988), Scioto App. No. 1629, unreported; *State* v. *Foster* (April 11, 1985), Cuyahoga App. No. 48885, unreported.[2]

The trial court further improperly instructed the jury in at least two respects. First, in charging the jury on the firearm specifications, O.R.C. § 2929.71, see Tr. 685, the trial court failed to instruct the jury that it was required to find the existence of the specifications beyond a reasonable doubt as required by Ohio law, and the Due Process Clause of the Fourteenth Amendment. *Boyce*, 21 Ohio App. 3d at 153, 486 N.E. 2d at 1247; *In re Winship*, 397 U.S. 358 (1970). A reasonable juror therefore could have reasonably interpreted the instruction to mean that such proof was not required. *Sandstrom* v. *Montana*, 442 U.S. 510, 516-17; *Francis* v. *Franklin*, 471 U.S. 307, 315 (1985).

The trial court committed the same constitutional error when it instructed the jury on the offense of having a weapon while under disability, O.R.C. § 2923.13(A)(2). It failed to instruct the jury that they had to find the elements of this offense beyond a reasonable doubt. (Tr. 684-85).

Additionally, at least three of the issues raised in co-defendant Richard Brooks' appeal were very viable issues for further

[2] The *Gaines* and *Foster* decisions have been lodged with the Clerk.

appeal to the Ohio Supreme Court.[3] The Ohio Court of Appeals action denied Penson the opportunity to further appeal these and the other issues discussed above to the Ohio Supreme Court and to further pursue relief in federal court. *See Ross* v. *Moffitt*, 417 U.S. 600, 611-12 (1974).

Finally, some of these issues, e.g., those dealing with voir dire and sentencing, demonstrate that errors raised on appeal often go beyond the determination of guilt or innocence. Thus, a determination that there is sufficient evidence in the record to support the convictions does not adequately protect a defendant's right to appeal as the State contends.

[3] Brooks raised a *Batson* v. *Kentucky*, 476 U.S. 79 (1986), issue because the prosecutor had used two peremptory challenges to remove the only two blacks on the jury. Tr. 149-151. *State* v. *Brooks* (June 4, 1987), Montgomery App. No. 9190, unreported. [The *Brooks* decision has been lodged with the Clerk]. The Court of Appeals held that defense counsel's objection was not timely because the jury had been sworn, although the alternates had not been selected. *Id.* at 10-11. Assuming, *arguendo*, the Court of Appeals' ruling to be correct, Penson still had the right to claim his trial counsel was ineffective for failing to timely object and appeal any adverse ruling to the Ohio Supreme Court. Brooks also raised the State's failure to prove beyond a reasonable doubt that he possessed a firearm, as defined in O.R.C. § 2923.11(B), which is required to prove the firearm specifications, O.R.C. § 2929.71. While the court overruled Brooks' argument, the issue as to the kind of proof necessary to prove the firearm element of the firearm specification statute is soon to be addressed by the Ohio Supreme Court. *See State* v. *Gaines* (Jan. 19, 1988), Scioto App. No. 1629, unreported, *certified to Ohio Supreme Court*, Case No. 88-323. [The *Gaines* decision and certification order have been lodged with the Clerk.] Finally, *Brooks* raised the trial court's improper instruction to the jury on complicity. The court's instruction implied that one of the defendants had committed each of the offenses, see TR. 676-77, and was not the standard Ohio jury instruction on complicity. See 4 Ohio Jury Instructions (1987) 340-41, § 523.03. The Court of Appeals overruled this argument, but one judge dissented. *Brooks* at 12-13, 18.

III. A HARMLESS ERROR ANALYSIS IS INAPPROPRIATE WHERE COUNSEL NEITHER FILES NOR THE COURT REQUIRES AN ADVOCATE'S BRIEF IN A NONFRIVOLOUS APPEAL AS IT IS EQUIVALENT TO A DENIAL OF COUNSEL.

The State argues that any constitutional error involving a violation of Penson's right to counsel on appeal is harmless error. Br. for Resp. 24-27. Contrary to the State's argument, the decisions of this Court make a harmless error analysis inappropriate here. Traditionally, the harmless error rule is only applied where the error does not affect an accused's substantial rights, *Chapman* v. *California*, 386 U.S. 18, 23 (1967), or the underlying fairness of a trial. *Rose* v. *Clark*, 478 U.S. ___, 92 L.Ed. 2d 460, 470; *Delaware* v. *Van Arsdall*, 473 U.S. 673, 681 (1986); *Satterwhite* v. *Texas*, ___ U.S. ___, 100 L. Ed. 2d 284 (1988). *See, e.g., Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of witness' identification obtained in violation of right to counsel); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel).

On the other hand, this Court has repeatedly recognized that Sixth Amendment violations of the right to counsel that "pervade the entire proceeding" "cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite*, 100 L.Ed. 2d at 293. *See also Holloway*, 435 U.S. at 475 (conflict of interest at trial); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *White* v. *Maryland*, 373 U.S. 59 (1963) (absence of counsel at arraignment affected entire trial because defenses not asserted were irretrievably lost). Thus, a trial where counsel is denied cannot reliably serve as a vehicle for determination of guilt or innocence and is fundamentally unfair. *Rose*, 92 L.Ed. 2d at 470.

An appeal is an "integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956). Counsel's presence and participation in the appellate process is fundamental and essential to adequate and effective review. *Douglas*, 372 U.S. at 356; *Evitts*, 469 U.S. at 392. Even where counsel alleges the appeal to be frivolous, an "*Anders* brief" must be filed to assure that the accused's constitutional rights are "scrupulously honored." *McCoy*, 100 L.Ed. 2d at 456. Accordingly, where, as in this case, appellate counsel is effectively denied in a nonfrivolous appeal, the appeal cannot reliably serve as a vehicle for finally adjudicating the guilt or innocence or appropriate sentence of a defendant and is fundamentally unfair.

As described in argument II, *supra*, counsel's refusal to assert available nonfrivolous issues in an advocate's brief essentially waived any opportunity for Penson to convince the court of their merits. *Cf. Evitts*, 469 U.S. at 389 (counsel failed to comply with appellate procedural rule, resulting in dismissal of appeal without ruling on merits). Since that opportunity is the sole function of an appeal, counsel's conduct "affected - and contaminated - the entire criminal proceeding." *Satterwhite*, 100 L.Ed. 2d at 294 (1988).

Rose v. *Clark*, 92 L.Ed. 2d at 460, cited by the State, does not support its position. In *Rose*, this Court applied a harmless error test to a *Sandstrom*, 442 U.S. at 510, violation. However, the Court stated that a harmless error analysis presupposes representation by counsel. *Rose*, 92 L.Ed. 2d at 470. The Court further held that unlike errors *such as the denial of counsel*,

> . . . the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced [the defendant] in this case.

Id. at 471-72 n. 7. The State uses this language to argue that this Court can review the trial record herein and determine the presence or absence of prejudice without any inherent difficulty. Br. for Resp. 27. The State's analysis is again inaccurate.

The error in this case, the denial of appellate counsel, did affect the composition of the appellate record reviewed by the Ohio Court of Appeals. Penson's appellate counsel presented no errors to that court. A harmless error analysis would require inquiry into issues that might have been, but were not, raised on appeal. Application of a harmless error test in this context would therefore be extremely speculative and not worth the costs. *Strickland*, 466 U.S. at 692. Until these issues are briefed, argued, and passed upon by the Ohio Court of Appeals, there is no way of knowing whether any would have been successful. "Thus, any inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Holloway* v. *Arkansas*, 435 U.S. at 490-91 (citations omitted).

Moreover, this Court should not defer to the Ohio Court of Appeals' finding of harmless error as it was that court that violated Penson's right to counsel. *See Rose* v. *Mitchell*, 443 U.S. 545 (1979) (trial court that violated Fourteenth Amendment in operation of grand jury system not likely to give full and fair hearing to such a claim). After applying the wrong legal standard, see *Anders*, 386 U.S. at 743, and failing to "scrupulously honor" Penson's right to counsel, see *McCoy*, 100 L.Ed. 2d at 456, the court summarily concluded that Penson had not been prejudiced by the denial of counsel. (J.A. 41). The Court engaged in no analysis of any issues other than one raised by a co-defendant, Richard Brooks. (J.A. 41).

The inadequacy of the Ohio Court of Appeals' conclusion as to harmless error or lack of prejudice is evidenced by the fact that the court did not discover this plain error until it was raised in Richard Brooks' appeal, after it had already adversely decided the other co-defendant, John Smith's, appeal.[4] Had the error

[4] These decisions, *State* v. *Brooks* (June 4, 1987), Montgomery App. No. 9190, unreported, *State* v. *Smith* (May 13, 1987), Montgomery App. No. 9168, unreported, and *State* v. *Smith* (June 5, 1987), Montgomery App. No. 9168, unreported (Amended Opinion), have been lodged with the Clerk.

not been raised by Brooks, it is highly unlikely Penson would have received the benefit of it. This further demonstrates why a harmless error analysis by the same court that denied the right to counsel cannot guarantee a defendant an adequate and effective review of his conviction. A harmless error standard simply cannot adequately assure protection of a defendant's fundamental right to counsel. *See* discussion in Br. for Pet. 21-22, 33-37, 45, regarding inadequacy of courts deciding issues without benefit of briefing and oral argument and federal habeas court's ability to review unlitigated state law issues.

One of the most fundamental rights in our criminal justice system is the accused's right to be heard by counsel. As Justice Sutherland said over fifty years ago in *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932),

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . ."

See also Cronic, 466 U.S. at 653. Steven Penson was denied that basic right in this case. Because his appointed attorney refused to provide any assistance, his appeal was nothing more than a "meaningless ritual". *Douglas*, 372 U.S. at 358. In short, the denial of counsel rendered Penson's appeal fundamentally unfair. *Evitts*, 469 U.S. at 395-396; *Cf. Gideon*, 372 U.S. at 335.

To suggest that a denial of counsel on appeal can be nonprejudicial not only demeans this fundamental constitutional right but the very appellate adversary process to which it is so essential. A concern for actual prejudice here misses the point. What is at stake here is the fairness and integrity of our appellate adversary system of criminal justice. *Cf. Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. ____, 95 L.Ed. 2d 740, 761 (1987), (appointment of interested prosecutor improper). These fundamental values cannot be protected unless the accused has counsel. *See Kimmelman*, 477 U.S. at 374. Therefore, society's interest in fairly and finally adjudicating the guilt or innocence of a defendant cannot be adequately

protected by a harmless error or prejudice standard, as such standard would not be sensitive to the fundamental nature of the error committed. *Young*, 95 L.Ed. 2d at 761.

CONCLUSION

For the foregoing reasons, Petitioner Steven Anthony Penson requests that the judgment of the Montgomery County, Ohio Court of Appeals be reversed and that the court be ordered to provide him with another appeal in which he is afforded the assistance of counsel.

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender

GREGORY L. AYERS
Chief Counsel
Counsel of Record

DAVID C. STEBBINS
Senior Assistant
State Public Defender

GEORGE A. LYONS
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: (614) 466-5394
Counsel for Petitioner

APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

OHIO REVISED CODE

§ 2901.02 Classification of offenses.

As used in the Revised Code:

(A) Offenses include aggravated murder, murder, aggravated felonies of the first, second, and third degree, felonies of the first, second, third, and fourth degree, misdemeanors of the first, second, third, and fourth degree, minor misdemeanors, and offenses not specifically classified.

(B) Aggravated murder when the indictment or the count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section

2929.04 of the Revised Code, and any other offense for which death may be imposed as a penalty, is a capital offense.

(C) Aggravated murder and murder are felonies.

(D) Regardless of the penalty which may be imposed, any offense specifically classified as a felony is a felony, and any offense specifically classified as a misdemeanor is a misdemeanor.

(E) Any offense not specifically classified is a felony if imprisonment for more than one year may be imposed as a penalty.

(F) Any offense not specifically classified is a misdemeanor if imprisonment for not more than one year may be imposed as a penalty.

(G) Any offense not specifically classified is a minor misdemeanor if the only penalty which may be imposed is a fine not exceeding one hundred dollars.

OHIO REVISED CODE

§ 2901.03 Common law offenses abrogated.

(A) No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.

(B) An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty.

(C) This section does not affect any power of the general assembly under section 8 of Article II, Ohio Constitution, nor does it affect the power of a court to punish for contempt or to employ any sanction authorized by law to enforce an order, civil judgment, or decree.

OHIO REVISED CODE

§ 2923.11 Definitions.

As used in sections 2923.11 to 2923.24 of the Revised Code:

(A) "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

(B) "Firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. "Firearm" includes an unloaded firearm, and any firearm which is inoperable but which can readily be rendered operable.

(C) "Handgun" means any firearm designed to be fired while being held in one hand.

(D) "Semi-automatic firearm" means any firearm designed or specially adapted to fire a single cartridge and automatically chamber a succeeding cartridge ready to fire, with a single function of the trigger.

(E) "Automatic firearm" means any firearm designed or specially adapted to fire a succession of cartridges with a single function of the trigger. "Automatic firearm" also means any semi-automatic firearm designed or specially adapted to fire more than thirty-one cartridges without reloading, other than a firearm chambering only .22 caliber short, long, or long-rifle cartridges.

(F) "Sawed-off firearm" means a shotgun with a barrel less than eighteen inches long, or a rifle with a barrel less than sixteen inches long, or a shotgun or rifle less than twenty-six inches long overall.

(G) "Zip-gun" means any of the following:

(1) Any firearm of crude and extemporized manufacture;

(2) Any device, including without limitation a starter's pistol, not designed as a firearm, but which is specially adapted for use as such;

(3) Any industrial tool, signalling device, or safety device, not designed as a firearm, but which as

designed is capable of use as such, when possessed, carried, or used as a firearm.

(H) "Explosive device" means any device designed or specially adapted to cause physical harm to persons or property by means of an explosion, and consisting of an explosive substance or agency and a means to detonate it. "Explosive device" includes without limitation any bomb, any explosive demolition device, any blasting cap or detonator containing an explosive charge, and any pressure vessel which has been knowingly tampered with or arranged so as to explode.

(I) "Incendiary device" means any firebomb, and any device designed or specially adapted to cause physical harm to persons or property by means of fire, and consisting of an incendiary substance or agency and a means to ignite it.

(J) "Dangerous ordnance" means any of he following, except as provided in division (K) of this section:

(1) Any automatic or sawed-off firearm, or zip-gun;

(2) Any explosive device or incendiary device;

(3) Nitroglycerin, nitrocellulose, nitrostarch, PETN, cyclonite, TNT, picric acid, and other high explosives; amatol, tritonal, tetrytol, pentolite, pecretol, cyclotol, and other high explosive compositions; plastic explosives; dynamite, blasting gelatin, gelatin dynamite, sensitized ammonium nitrate, liquid-oxygen blasting explosives, blasting powder, and other blasting agents; and any other explosive substance having sufficient brisance or power to be particularly suitable for use as a military explosive, or for use in mining, quarrying, excavating, or demolitions;

(4) Any firearm, rocket launcher, mortar, artillery piece, grenade, mine, bomb, torpedo, or similar weapon, designed and manufactured for military purposes, and the ammunition therefor;

(5) Any firearm muffler or silencer;

(6) Any combination of parts that is intended by the owner for use in converting any firearm or other device into a dangerous ordnance.

(K) "Dangerous ordnance" does not include any of the following:

(1) Any firearm, including a military weapon and the ammunition therefor, and regardless of its actual age, which employs a percussion cap or other obsolete ignition system, or which is designed and safe for use only with black powder;

(2) Any pistol, rifle, or shotgun, designed or suitable for sporting purposes, including a military weapon as issued or as modified, and the ammunition therefor, unless such firearm is an automatic or sawed-off firearm;

(3) Any cannon or other artillery piece which, regardless of its actual age, is of a type in accepted use prior to 1887, has no mechanical, hydraulic, pneumatic, or other system for absorbing recoil and returning the tube into battery without displacing the carriage, and is designed and safe for use only with black powder;

(4) Black powder, priming quills, and percussion caps possessed and lawfully used to fire a cannon of a type defined in division (K)(3) of this section during displays, celebrations, organized matches or shoots, and target practice, and smokeless and black powder, primers, and percussion caps possessed and lawfully used as a propellant or ignition device in small-arms or small-arms ammunition;

(5) Dangerous ordnance which is inoperable or inert and cannot readily be rendered operable or activated, and which is kept as a trophy, souvenir, curio, or museum piece.

(6) Any device which is expressly excepted from the definition of a destructive device pursuant to the "Gun Control Act of 1968," 82 Stat. 1213, 18 U.S.C. 921 (a)(4), and any amendments or additions thereto or reenactments thereof, and regulations issued thereunder.

OHIO REVISED CODE

§ 2923.13 Having weapons while under disability.

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) Such person is a fugitive from justice;

(2) Such person is under indictment for or has been convicted of any felony of violence, or has been adjudged a juvenile delinquent for commission of any such felony;

(3) Such person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse, or has been adjudged a juvenile delinquent for commission of any such offense;

(4) Such person is drug dependent or in danger of drug dependence, or is a chronic alcoholic;

(5) Such person is under adjudication of mental incompetence.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the fourth degree.

OHIO REVISED CODE

§ 2929.71 [Additional three years of actual incarceration for offenses involving a firearm.]

(A) The court shall impose a term of actual incarceration of three years in addition to imposing a life sentence pursuant to section 2907.02, 2907.12, or 2929.02 of the Revised Code or an indefinite term of imprisonment pursuant to section 2929.11 of the Revised Code, if both of the following apply:

(1) The offender is convicted of, or pleads guilty to, any felony other than a violation of section 2923.12 of the Revised Code;

(2) The offender is also convicted of, or pleads guilty to, a specification charging him with having a firearm on or about his person or under his control while committing the felony. The three-year term of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to, the life sentence or the indefinite term of imprisonment.

(B) If an offender is convicted of, or pleads guilty to, two or more felonies and two or more specifications charging him with having a firearm on or about his person or under his control while committing the felonies, each of the three-year terms of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to the life sentences or indefinite terms of imprisonment imposed pursuant to sections 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code, unless any of the felonies were committed as part of the same act or transaction. If any of the felonies were committed as part of the same act or transaction, only one three-year term of actual incarceration shall be imposed for those offenses, which three-year term shall be served consecutively with, and prior to, the life sentences or indefinite terms of imprisonment imposed pursuant to section 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code.

(C) No person shall be sentenced pursuant to division (A) of this section unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.141 [2941.14.1] of the Revised Code.

(1) "Firearm" has the same meaning as in section 2923.11 of the Revised Code;

(2) "Actual incarceration" has the same meaning as in division (C) of section 2929.01 of the Revised Code, except that a term of actual incarceration imposed pursuant to this section shall not be diminished pursuant to section 2967.19 of the Revised Code.

OHIO REVISED CODE

[§ 2941.14.1] § 2941.141 Specification that offender had a firearm while committing the offense.

(A) Imposition of a term of actual incarceration upon an offender under division (A) of section 2929.71 of the Revised Code for having a firearm on or about his person or under his control while committing a felony is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender did have a firearm on or about his person or under his control while committing the offense. A specification to an indictment, count in the indictment, or information charging the offender with having a firearm on or about his person or under his control while committing a felony shall be stated at the end of the body of the indictment, count, or information, and shall be in substantially the following form:

SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about his person or under his control while committing the offense).

(B) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

OHIO REVISED CODE

§ 2941.25 Multiple Counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate

animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

OHIO RULES OF APPELLATE PROCEDURE

RULE 12. DETERMINATION AND JUDGMENT ON APPEAL

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error.

(B) Judgment as a Matter of Law. When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

(C) Judgment in Civil Action or Proceeding When Sole Prejudicial Error Found Is That Judgment of Trial Court Is Against the Manifest Weight of the Evidence. In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence.

(D) All Other Cases. In all other cases where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings.

[Amended effective July 1, 1973.]

No. 87-6116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STEVEN ANTHONY PENSON,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE CIVIL LIBERTIES UNION OF OHIO, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

LARRY W. YACKLE
(*Counsel of Record*)
Boston University
School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

KIM ROBERT FAWCETT
National Legal Aid and
Defender Association
1625 K Street, N.W.
Washington, D.C. 20006
(202) 452-0620

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

QUESTION PRESENTED

Whether a state appellate court commits reversible constitutional error if it fails to provide an indigent criminal appellant with a professional advocate to press claims that are acknowledged to be nonfrivolous.

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INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Ohio is one of its affiliates.

The National Legal Aid and Defender Association is a private, non-profit, national membership organization headquartered in Washington, D.C., whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, the NLADA represents approximately 1,753 programs engaged in providing representation to indigents arrested on or convicted of criminal charges. The membership of NLADA, therefore, comprises most public defender offices and legal services agencies around the nation.

Both the ACLU and the NLADA have long worked to protect the rights of criminal defendants and have filed many briefs, as counsel for a litigant or as amicus curiae, in criminal cases requiring the interpretation of federal constitutional provisions.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae in support of the petitioner.

STATEMENT OF THE CASE

The procedural history of this case is described in the opinion of the Ohio Court of Appeals. The petitioner, Steven Anthony Penson, and two co-defendants, Richard Brooks and John Albert Smith, Jr., were tried jointly on multiple charges. All three men were convicted on at least some counts and were sentenced to prison terms. Because all three were indigent, separate counsel was appointed for each to press appeals as of right to the Ohio Court of Appeals.

Counsel for Brooks and Smith filed briefs on behalf of their clients. By contrast, the attorney assigned to represent Mr. Penson moved to withdraw on the basis of a conclusory statement that he had "carefully reviewed" the record and had found "no errors requiring reversal, modification and/or vacation" of Penson's convictions or sentences. Petition

for Writ of Certiorari at A9 (emphasis supplied).

The court of appeals granted counsel's motion to withdraw, but rejected Penson's request that another lawyer be appointed to pursue the appeal. Penson was given time in which to file a brief pro se, but he was unable to do so. The court of appeals then decided the issues on appeal aided only by the briefs filed on behalf of the co-defendants.

The court of appeals identified "several arguable claims" available to Penson and, indeed, concluded that one such claim was meritorious. Finding the evidence insufficient to support a jury instruction regarding one count of assault, the court reversed Penson's conviction on that count and vacated the relevant sentence. Penson's other convictions, together with the sentences attached to them, were sustained summarily.

The court of appeals was "troubled" that Penson's appointed attorney failed to recognize any arguable claims and frankly found counsel's position to be "highly questionable." Petition for Writ of Certiorari at A5-6. Nevertheless, the court considered the appeal without benefit of an advocate for Mr. Penson. Resting on its own review of the file and on the co-defendants' briefs, the court concluded that Penson had "suffered no prejudice" flowing from his attorney's failure to give the record a "more conscientious examination." Id. at A6.

Represented by a different attorney, Mr. Penson challenged the court of appeals' disposition of his right to counsel in an appeal to the Ohio Supreme Court. That court dismissed for want of a "substantial" question, and this Court granted Penson's subsequent petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This is one in a series of recent cases in which the Court has the opportunity to elaborate upon the states' constitutional responsibility to provide effective advocates to indigent criminal appellants.[1] This case, however, presents no novel questions. Rather, it presents an enforcement problem created by the failure of Ohio's appellate courts to conform their practices to this Court's well-established rulings, both in this instance and

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[1] E.g., Evitts v. Lucey, 469 U.S. 387 (1985)(recognizing that criminal appellants have a fourteenth amendment right to the effective assistance of counsel); Pennsylvania v. Finley, 107 S.Ct. 1990 (1987)(reaffirming the right to effective assistance of counsel on appeal but treating post-appeal state proceedings differently); McCoy v. Wisconsin Court of Appeals, No. 87-5002 (involving a Wisconsin rule requiring appellate counsel who wish to withdraw to discuss why they believe their clients' claims to be frivolous). The ACLU and the NLADA filed independent amicus briefs in Finley and joined in a brief in McCoy. Those briefs may be read in conjunction with this one.

in many other instances identified by Mr. Penson's current attorney.

The Ohio courts' failure to provide Mr. Penson with a professional advocate to brief nonfrivolous issues on appeal represents a glaring violation of the due process and equal protection clauses of the fourteenth amendment. In prior cases, this Court has made it clear that indigent appellants have a right to effective assistance of counsel on first appeal as of right. In this case, the Ohio courts violated that right by considering Mr. Penson's appeal without benefit of such an advocate.

To be sure, counsel was initially appointed for Mr. Penson by the Ohio Court of Appeals. Despite the existence of arguable claims that might have been raised on Penson's behalf, however, that lawyer was permitted to withdraw without filing a brief to assist his

client and the court. Counsel's performance was not only inadequate in light of this Court's decision in Anders v. California, 386 U.S. 738 (1967), and ineffective within the meaning of Evitts v. Lucey, supra, but nonexistent in violation of Douglas v. California, 372 U.S. 353 (1963).

Mr. Penson can be denied relief only if the Court sees fit to change well-settled propositions of constitutional law. Any such change would be unnecessary and unwise. In particular, we believe that Anders strikes an appropriate balance between counsel's obligations to the client and to the court. The doctrine set forth in Anders is not a set of judge-made nonconstitutional guidelines designed to assist the state courts. That doctrine is hard constitutional law, forged to address a vexing problem in criminal justice administration in a manner that is both

theoretically sound and practically workable.

Under Anders, counsel may request permission to withdraw when he or she can find no issues that are so much as "arguable," in the sense that they are not wholly "frivolous." In cases in which nonindigent appellants are able to retain counsel, both client and counsel have powerful incentives to pursue an appeal on the merits. The client's interest is in seeking reversal and avoiding loss of liberty; retained counsel's interest is economic--and often substantial. By contrast, in cases involving indigent appellants, counsel's incentives work in the opposite direction. Private attorneys stand to collect only modest fees for appellate assignments and thus wish to move on to more lucrative cases; public defenders wish to concentrate effort on the most promising cases on their crowded dockets.

Anticipating that appointed lawyers will undervalue indigents' claims, this Court has only two realistic options: (1) A general rule requiring appointed counsel to brief the merits notwithstanding a personal judgment that none is arguable; (2) The less demanding rule in Anders, which requires counsel to file a brief identifying the claims counsel considered in coming to his or her conclusion.

Given counsel's incentives to undervalue such claims, it is essential that the appellate court make an independent appraisal of the record and thus check counsel's judgment. An "Anders brief" is easy to prepare and plainly necessary if the court is to make an intelligent, informed decision.

Finally, the constitutional right at stake in this case and others like it cannot properly be subject to a special "prejudice" requirement. This Court has never required a showing of "prejudice" in right-to-counsel cases. The critical distinction is between misfeasance and nonfeasance. Since Mr. Penson's appointed attorney did not merely perform poorly, but failed to perform at all, the unfavorable portions of the resulting judgment cannot stand.

ARGUMENT

I. THE OHIO COURTS' FAILURE TO PROVIDE THE PETITIONER WITH A PROFESSIONAL ADVOCATE TO PRESS NON-FRIVOLOUS CLAIMS ON FIRST APPEAL AS OF RIGHT VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AS INTERPRETED IN THIS COURT'S PRECEDENTS

For twenty-five years, it has been settled that indigent criminal appellants are constitutionally entitled to appointed counsel on first appeal as of right. Douglas v. California, supra. Any other rule would deny indigent appellants a fair opportunity to make use of the appellate process (a denial of due process) and would penalize impoverished citizens unable to purchase effective legal services (a denial of equal protection of the laws). See Pennsylvania v. Finley, supra at 1993; Evitts v. Lucey, supra at 405 & n.12 (reaffirming that the right recognized in Douglas rests on both the due process and equal protection clauses).

This right to counsel on appeal implies, of course, a right to effective counsel, namely an attorney who takes the role of an "active advocate" as opposed to a "mere friend of the court assisting in a detached evaluation of the appellant's claims." Evitts, supra at 394.

In cases like this one, in which a lawyer assigned to represent an indigent on appeal actively resists performing the functions expected of an advocate, both the client's right to counsel and the corollary right to effective counsel are at risk. An appellate court cannot simply permit appointed counsel to withdraw and refuse to appoint a substitute, thus taking back from the appellant the very professional representation to which the client is constitutionally entitled.

Nor can a court accept such an attorney's unilateral conclusion that the claims available to the client are frivolous and thus not worth pursuing. If the right to an appellate advocate is to be taken seriously, the court must make its own independent examination of those claims--to ensure that lawyers do not resolve doubts against an indigent client in order to justify passing on to more lucrative or more promising cases.

When an attorney assigned to handle an indigent appeal asks to withdraw, he or she is constitutionally obligated to prepare a brief referring to anything in the record that might arguably support an appeal. A brief of that kind must be supplied both to the client, who can use it in the preparation of a substitute brief pro se, and to the appellate court, which can use it as an aid in making an independent appraisal of the claims available.

If the court concludes that counsel is correct in assessing all possible claims as frivolous, a motion to withdraw can be granted and the appeal can proceed on the appellant's pro se brief alone. If, however, the court considers a claim or claims to be arguable, then the appellant must be provided with an advocate to press those claims on the merits.[2] This, of course, was the square holding in Anders.

Mr. Penson's treatment in the instant case comes nowhere close to meeting these well-settled constitutional standards. The lawyer appointed to represent him on appeal failed utterly in his constitutional obligation to advocate on his client's behalf.

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[2] This case provides no occasion for determining whether, in these circumstances, a state court should or must appoint a different attorney to represent the appellant. The desirability of involving a lawyer who has not previously (and publicly) declared that the client's claims are frivolous is, however, self-evident.

By his own admission, counsel merely reviewed the record, decided (mistakenly) that he was unlikely to succeed on any claim, and on that basis asked for permission to withdraw. Counsel did not, and plainly could not, propose that the claims open to his client were frivolous. He reported only that in his view the claims were not so meritorious as to require relief. He submitted no brief referring to claims that might support an appeal and, of course, provided no such brief to Penson.

Thereafter, things only deteriorated constitutionally. The Ohio Court of Appeals fully recognized that there were arguable claims for the appeal and, indeed, found one such claim sufficient to justify a reversal of conviction and vacation of sentence. Nevertheless, the court permitted counsel to withdraw. Rejecting Mr. Penson's timely

request for substitute counsel, the court treated the appeal without the slightest assistance from an advocate for Mr. Penson. While, to be sure, the court overturned one conviction, it sustained Penson's convictions and sentences on all other counts.

The flagrant violation of Mr. Penson's constitutional right to counsel is scarcely mitigated by the coincidence that the court of appeals had access to briefs filed on behalf of Brooks and Smith. By hypothesis, those briefs were prepared by advocates for other appellants, not Penson, and thus could hardly serve as surrogates. By appointing separate attorneys to represent the three co-defendants on appeal, the court of appeals plainly recognized that their interests might well diverge. If it was important to secure separate counsel for each man in order that each, in turn, should have an advocate on his

behalf alone (and it surely was), then it was equally vital to consider the work product of those independent attorneys separately. It is, indeed, the very nature of advocacy that it can serve only one interest, or perfectly consistent interests, at a time.

In sum, the treatment accorded to Mr. Penson by the Ohio courts failed all the relevant constitutional standards established by this Court. The attorney appointed to advocate on his behalf neglected the most rudimentary elements of his constitutional obligations. The Ohio Court of Appeals, in turn, not only permitted counsel to abdicate, but refused to appoint a substitute attorney and thus treated the appeal without benefit of an advocate. All this was flatly inconsistent with the doctrine established in Anders.

The resulting appeal, moreover, was undertaken in stark violation of Penson's

right to the effective assistance of counsel recognized in Evitts, supra. Counsel failed on the most fundamental level to press his client's constitutional claims in the role of a genuine advocate. Quite the contrary, counsel shirked any such responsibility from the outset. Unable to say that his client's claims were frivolous, counsel nevertheless withdrew because he thought (wrongly) that they would not actually win a reversal.

Finally, on a deeper level, the state courts' failure either to keep the original attorney on the job or to provide Penson with substitute counsel constitutes an unadorned violation of the right to appellate counsel recognized in Douglas, supra. Realistically appraised, this case is not about poor representation so much as it is about the absence of any representation at all for a man hopelessly unable to fend for himself.

The egregious disposition of this single appeal by the Ohio courts is rendered more serious by evidence, supplied by Mr. Penson's current counsel, that the Ohio courts maintain a general practice of treating indigents in this manner. In case after case, the courts of Ohio have disregarded the constitutional rights of a series of criminal appellants like Mr. Penson.[3] Unfortunately, but necessarily, this Court must call a halt to this routine neglect of its precedents and must insist that the Ohio courts conform their practices to the fourteenth amendment. To allow this practice to continue would be to invite the courts of Ohio and other states to ignore this Court's constitutional precedents.

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[3] In most instances, the Ohio appellate courts have not had access to briefs filed by advocates for co-defendants.

II. THIS COURT'S PRECEDENTS STRIKE THE PROPER BALANCE BETWEEN APPOINTED COUNSEL'S CONSTITUTIONAL OBLIGATION TO THE CLIENT AND COUNSEL'S PROFESSIONAL RESPONSIBILITIES TO THE COURT

The Ohio courts' departure from precedent in this case can be countenanced only if this Court, too, sees fit to abandon constitutional principles of long standing. We urge the Court not to do so. Surely there can be no question of discarding the bedrock holding in Douglas that indigent criminal appellants have a right to counsel, and it would be untenable to reject the corollary understanding, confirmed so recently in Evitts, that counsel's performance must be effective. We focus, accordingly, on the doctrine forged in Anders precisely for cases such as this, in which appointed counsel seeks to escape an assignment to advocate on behalf of an indigent appellant.

Anders has its detractors. The primary concern seems to be that counsel may find it awkward both to declare that a client's issues are frivolous (necessary to justify a motion to be relieved) and to file a brief referring to claims in the record that might support an appeal. Yet worries such as this depend upon an inaccurate reading of the Anders opinion and a flawed understanding of the reasoning behind that opinion. To demonstrate as much, we divide our argument into two parts--first clarifying the procedure that Anders in fact contemplates and then explaining how that procedure responds to the demands of the situation.

A. What Anders Does (And Does Not) Require of Counsel and the Court

It is essential at the threshold to be clear with respect to the terminology emplcyed in Anders and other cases in which it is

necessary to characterize the relative strength of legal claims. Anders does not ask lawyers to take inconsistent positions--to state that an appeal is frivolous and at the same time to identify nonfrivolous claims. Nor does Anders draw hair-fine distinctions between "frivolous" issues and claims that are not "arguable." Under Anders, claims that are not "arguable" are "frivolous" by definition.

Anders merely recognizes three conventional classes of claims: (1)frivolous claims, i.e., claims so worthless as to be inadmissible in serious professional argument; (2)arguable claims, i.e., claims which may appear weak but which are sufficiently tenable to permit a professional advocate to advance them; (3)meritorious claims, i.e., claims sufficiently strong to be sustained by the reviewing court.

In the cases to which Anders is addressed, only the distinction between the first and the second kinds of claims is crucial. In the first instance, counsel may move to withdraw if he or she has studied the record and has concluded in his or her own mind that the claims available to the client are frivolous (not arguable). Before withdrawal can be approved, however, counsel must file a brief identifying those claims to the court, which "might" find them to be nonfrivolous (arguable) notwithstanding counsel's contrary judgment.

In this regard, counsel's task is hardly so intellectually awkward as some critics suggest. Open-minded professionals are often called upon both to give their own views and to outline alternative positions that other professionals might take--and why. Nor does the recognition that the court may override a

lawyer's judgment bespeak lack of respect for counsel's professional integrity. The point of the "Anders brief" is only to facilitate an independent judicial examination. The reason why a judicial determination is necessary is the matter to which we now turn.

B. Anders' Theoretical Foundations

The doctrinal framework established in Anders responds in a theoretically sound and practically workable fashion to the constitutional values reflected in the due process and equal protection clauses and the incentive structure that must be anticipated in this context.[4]

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[4] The decisions in this line are, in fact, constitutional cases. Anders itself was decided during a period in which the Court occasionally fashioned so-called "prophylactic" rules, not constitutionally mandated themselves but instituted to protect underlying constitutional rights. When the Court announced such rules, however, their special status was noted explicitly. E.g., Miranda v. Arizona, 384 U.S. 436, 467 (1966);

It is useful to begin with the situation in which a nonindigent citizen suffers conviction in a criminal prosecution and contemplates appellate review. By hypothesis, such a nonindigent can purchase the services of a professional advocate to review the record, to marshal the issues, and to file a brief on the merits.

United States v. Wade, 388 U.S. 218, 237-39 (1967). In Anders, by contrast, the Court expressly stated that the doctrine then being elaborated was itself constitutional law:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate....[Counsel's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, ...he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal....

Anders, supra at 744 (emphasis supplied).

Inexperienced observers may conceive of circumstances in which counsel reports that all available claims are so patently frivolous as to make the cause hopeless and in which the appellant chooses to save his or her money. Retained counsel's professional hesitancy to press frivolous claims may also suggest (in the minds of the inexperienced) that nonindigents will abandon efforts to overturn their convictions in an appreciable number of cases and will choose to spend their money in another way.[5]

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[5] It is this vision of a budget-conscious nonindigent whose fastidious retained lawyer balks at frivolous claims which drives the common explanation for refusing to ask appointed counsel to brief the merits of frivolous claims on behalf of indigents. If, it is said, nonindigents would not, and perhaps could not, purchase an advocate's brief on the merits in such a case, then the state does not deny indigents the equal protection of the laws by declining to provide such a brief free of charge. The trouble with this vision, of course, is that it is a vision as opposed to a picture of reality--as we explain in the text.

In actual practice, however, both the magnitude of the players' incentives and the imaginations of retained lawyers make any such scenario exceedingly unlikely. The stakes for the appellant are extraordinarily high. Liberty itself is typically at stake, and it is the rare person who will waive even a remote chance of upsetting a criminal conviction in favor of some other use of capital. We know of no empirical data showing that nonindigent convicts watch their budgets carefully.

Retained counsel, moreover, has a powerful economic incentive to locate some arguable claim to justify charging the client a fee. It seems only reasonable that an intelligent attorney will be able to develop claims that he or she can pursue professionally. Issues sufficient to form the

basis for an appeal are not so cut-and-dried that reasonable minds routinely agree on what is or is not arguable in the minimal sense in which that term is used in the case law. At the very least, it is almost always possible to contest the severity of the client's sentence.

In the end, then, the appellate courts are invariably presented with briefs on the merits in cases in which the appellant is nonindigent. There is no reason to believe, and no evidence to suggest, that nonindigent clients are routinely mistreated by careless attorneys who disregard tenable claims. The incentive structure in place powerfully augers for vigorous appellate advocacy.

In cases involving indigent defendants, by contrast, the incentive structure supplies no similar assurance. Indigents have the same desire as nonindigents to press an appeal in

hopes of obtaining relief. Yet they cannot hire their own lawyers. The great constitutional commitment in Douglas was intended to compensate for the indigent's poverty and to provide appellate counsel free of charge, lest the kind of justice a citizen gets be determined by the amount of money he or she has.

Providing appointed counsel to indigents is only a beginning, however. The state's willingness to pay for the indigent's professional assistance does not invoke the incentive structure at work in nonindigent cases. While the client retains a desire to press forward, appointed lawyers lack the economic incentives that typically motivate retained counsel to satisfy an enthusiastic client by identifying arguable claims.

The fees fixed for legal services in indigent cases are notoriously low,[6] and private lawyers may tend to give such cases short shrift in order to move on to more lucrative opportunities. Salaried public defenders, who lack that naked economic disincentive, are influenced by another of equal power. Their case loads are typically heavy, and they reasonably wish to concentrate scarce time and effort on the most promising cases. Either way--whether the attorney involved comes from the private bar or public service--the incentive structure facing appointed counsel is likely to generate an outsized number of reports that claims are frivolous. Reports of that kind raise very real and justifiable concerns that indigent

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[6] The amicus brief filed in this case by the Ohio Association of Criminal Defense Lawyers reviews the fees available in Ohio.

clients may be denied counseled appeals that are warranted by the circumstances.

Constitutional doctrine, if it is to be meaningful, must take account of this incentive structure and must counter its invidious results. There are only two options. First, the Court can set aside any reservations counsel may have and require an appointed lawyer to brief the merits of at least some claims, despite his or her judgment that those claims are frivolous.[7] Such a rule would have two readily-apparent advantages. Most important, it would approximate the state of affairs with respect to nonindigents. Again, the incentives in favor of briefing the

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[7] Of course, appointed counsel should give the client the benefit of professional judgment and thus may not press every claim sound enough to be considered arguable. Yet there is a world of difference between discarding weak issues and focusing upon stronger claims in a counseled appeal, e.g., Jones v. Barnes, 463 U.S. 745 (1983), and abandoning an appeal altogether.

merits in that context are so strong, on the part of client and counsel alike, that full dress appeals can be expected in virtually every instance.[8]

A rule requiring appointed counsel to brief the merits would also have the virtue of obviating further worry about when, and the conditions under which, counsel can be permitted to withdraw and appeals can be handled without professional representation for the appellant. A bright-line rule--crisp, clean, and easy to administer--would be of great value both to lawyers and to courts. The appellate courts would presumably receive

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[8] The distance between a claim that an appointed attorney considers to be frivolous (under the influence of incentives to undervalue the client's issues in order to justify withdrawal) and claims that a retained lawyer considers to be arguable (under the influence of economic incentives to identify nonfrivolous claims in order to justify charging the client a fee) is likely not to be great.

more briefs on the merits, but those briefs would at least be prepared by lawyers. More significantly, the courts would be freed from litigation over decisions to deny appellate counsel to indigents.

The alternative, of course, is Anders. A lawyer can be appointed to represent an indigent as a vigorous advocate and can be charged to search the record for any arguable claims. If any such claim appears, counsel is duty-bound to brief it for review--just as would a retained attorney representing a paying client. If appointed counsel concludes that all available claims are frivolous and, accordingly, that it would be unprofessional to press them in court, he or she can be permitted to report as much to the client and the court and to move to withdraw.

Given the incentives known to operate upon appointed counsel in these circumstances,

however, the court cannot allow an attorney's personal judgment to determine whether the client is to have a counseled appeal. Accordingly, Anders requires counsel to submit a brief which identifies, both to the client and to the court, the issues counsel considered before asking to be relieved. With such a brief in hand, the court can make an independent appraisal of those claims as a check on counsel's conclusion.

The Anders procedure is theoretically sound and practically workable. Having just examined the record and studied available claims in drawing his or her own conclusions, appointed counsel is in an excellent position to draft an "Anders brief" quickly and efficiently. If such a brief were not required, both the client and the court would be left with only the cold record. Difficult as it may be for an appellate court to locate

arguable issues in a case with counsel's help, it would be much more difficult to identify such issues without the assistance of the lawyer who knows the record best.

As we explained earlier, the instant case does not require the Court to revisit its well-established precedents in this field. Mr. Penson can be given the relief to which he is entitled pursuant to the analysis in Point I, supra. If, however, the Court is inclined to rethink these issues, the only realistic options are to reaffirm Anders or to require appointed counsel to brief the merits in every indigent appeal. Under either option, the procedure followed below was constitutionally deficient. Accordingly, Mr. Penson's conviction cannot be upheld without breaking faith with Douglas itself.

III. CRIMINAL APPELLANTS WHO SUFFER THE KIND OF CONSTITUTIONAL VIOLATION EVIDENT IN THIS CASE ARE ENTITLED TO REVERSAL WITHOUT A SPECIAL SHOWING OF "PREJUDICE"

The Ohio Court of Appeals' attempt to save its judgment on the ground that Mr. Penson was not "prejudiced" by lack of appellate counsel is wholly inadequate. To take that position, the state court had to reject the thinking behind Douglas, Evitts, and Anders at the most fundamental level. That court had to conclude that its own, unaided examination of the cold record somehow substituted for the appellate advocate to which Penson was constitutionally entitled. Yet the precedents reflect the judgment that the appraisal of which a neutral appellate court is capable simply cannot suffice for vigorous advocacy by an attorney charged to represent a client with warm zeal. In our constitutional system, criminal appeals are

and must be adversarial in character, and no disinterested review by a court, however sympathetic, can serve as well.

This court has occasionally made a special showing of "prejudice" an essential element of a substantive constitutional claim. The impulse to do that in some circumstances is understandable. In an ordinary "effective assistance of counsel" case, for example, it may often be easy to identify some flaw in counsel's trial-level performance. And if reversal were required in every such case, criminal convictions would rarely withstand review. The Court has therefore insisted that counsel's errors must have "prejudiced" the client. Strickland v. Washington, 466 U.S. 668 (1984).

The Court has held explicitly that no special showing of "prejudice" is necessary in cases in which the state utterly fails to

provide any counsel. E.g., Gideon v. Wainwright, 372 U.S. 335 (1963)(denial of counsel at trial); Cuyler v. Sullivan, 446 U.S. 335 (1980)(denial of conflict-free counsel). As the Court explained in Strickland, supra, "prejudice" can be presumed in these cases for two reasons. First, the existence of "prejudice" is so likely that a case-by-case inquiry is "not worth the cost." Second, the impairment of the individual's constitutional rights is "easy to identify" and thus "easy for the government to prevent." Id. at 692.

The instant case is, of course, one in which counsel was not provided at all. The attorney who was appointed for Mr. Penson promptly withdrew, and the appeal which followed was heard after counsel had been released. There is no dispute about this. The Ohio Court of Appeals explicitly

recognized that no attorney appeared for Mr. Penson. Nevertheless, that court considered and decided the arguable claims the court itself put in Penson's mouth.

Because counsel was not provided at all, the likelihood of "prejudice" to Mr. Penson was palpable. As the Court explained in Douglas, appellate counsel supplies the only "real chance" an indigent has to demonstrate that claims have "hidden merit" that is not apparent from the "barren record." 372 U.S. at 356.

And, of course, the constitutional violation here was glaring. The state of Ohio had an unquestioned constitutional obligation to provide Mr. Penson with counsel on appeal and flatly failed to meet that obligation. The Ohio Court of Appeals fully understood the implications of allowing the original appointed attorney to withdraw and refusing to

appoint a substitute. This was not a case in which appointed counsel allegedly failed to serve a client properly in circumstances in which it was difficult for state officials to detect the wrong and set it right. It would have been a simple matter to avoid the violation of Mr. Penson's rights. So far from ensuring that counsel assumed his responsibilities, the court of appeals capitalized on counsel's default and deliberately denied Mr. Penson any appellate counsel.

This Court would send a dangerous signal to lawyers and courts if it were to sustain the Ohio courts' decision in this case on the ground that Mr. Penson was not "prejudiced." State courts would be tempted to disregard Douglas routinely and thus to handle indigent appeals ex parte--explaining away their failure to conform to the fourteenth amendment

on the ground that, in their view, counsel was not needed. Indeed, this is precisely what Ohio seems already to be doing on the apparent hope that this Court will acquiesce. If Douglas is not to be overruled by the back door, and if the very real reasons for supplying indigent appellants with counsel are not to be ignored, then a frank failure to provide Mr. Penson with an advocate in this case must bring reversal.

Because this case, like Evitts, provides no occasion for evaluating the "effectiveness" of counsel on appeal, any inquiry into "prejudice" would be misplaced. We hasten to add, however, that when the Court takes a case in which this "prejudice" question is actually presented, the greatest care should be taken to avoid any standards that defy effective enforcement.

CONCLUSION

For the reasons stated herein, the decision below should be reversed and the case remanded for the appointment of a professional advocate to represent Mr. Penson in new appellate proceedings in state court.

Respectfully submitted,

LARRY W. YACKLE
Counsel of Record
Boston University
School of Law
765 Commonwealth Avenue
Boston, Mass. 02215
(617) 353-2826

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
132 West 43 Street
New York, NY 10036
(212) 944-9800

KIM ROBERT FAWCETT
National Legal Aid
and Defender Association
1625 K Street, N.W.
Washington, D.C. 20006
(202) 452-0620

April, 1988

No. 87-6116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STEVEN ANTHONY PENSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

On Writ of Certiorari
to Court of Appeals of
Montgomery County, Ohio

Brief of the Ohio Association of Criminal Defense Lawyers Amicus Curiae in Support of Petitioner

GLORIA A. EYERLY, ESQ.
Counsel of Record
490 South High Street
Columbus, Ohio 43215
(614) 462-3960

HARRY R. REINHART, ESQ.
536 South High Street
Columbus, Ohio 43215
(614) 488-8528

COUNSEL FOR AMICUS CURIAE

OHIO ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

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INTEREST OF AMICUS CURIAE

The Ohio Association of Criminal Defense Lawyers is a statewide organization of more than four-hundred (400) attorneys specializing in the practice of criminal law. The organization is affiliated with the National Association of Criminal Defense Lawyers and it has been formed for charitable, scientific and educational purposes including the proper administration of justice and research in the field of criminal defense law.

The membership of the Ohio Association of Criminal Defense Lawyers includes both private practitioners and public defenders. The Ohio Association of Criminal Defense Lawyers, through its membership, has a presence in each of Ohio's twelve appellate districts. Many of these attorneys have assisted in this brief by gathering data and researching the files located in the various counties where these cases originated. This statewide presence gives the Ohio Association of Criminal Defense Lawyers the unique ability to gather and present data to this Court that would otherwise remain hidden from review due to the difficulty and expense of collection.

With the consent of the parties, as indicated by letters lodged with the Clerk of this court, the Ohio Association of Criminal Defense Lawyers respectfully submit this brief in support of petitioner.

QUESTION PRESENTED

When A State Court Of Appeals Determines That There Are Arguable Issues That Could Be Raised On Appeal, Is The State Court Of Appeals Required To Provide Counsel To An Indigent Appellant Before Reviewing The Case And Deciding The Merits?

SUMMARY OF THE ARGUMENT

Substantial equality and fair process are constitutional requirements. They compel a special procedure when appointed counsel deems frivolous an indigent's appeal of right in a criminal case. This is the constitutional mandate of *Anders v. California*, 386 U.S. 738 (1967). The experience in Ohio is that assigned counsels' obligations under *Anders* have not been enforced by the courts. In addition, the appellate courts have also failed to live up to their obligations under *Anders*. Most significantly, the appellate courts have identified arguable claims in numerous cases yet failed to require counsel to brief these issues before reaching the merits.

Understandable economic forces have caused this noncompliance. These same forces have eroded the distinction between appeals which are frivolous and those which are simply unlikely to result in reversal of the conviction. The expanded definition of "frivolous appeal" encompasses virtually all criminal appeals. Because appeals labeled frivolous are less thoroughly examined, there has been an overall degradation in the quality of review afforded indigent criminal appellants as a class.

The proper definition of a frivolous appeal is far narrower. An appeal is truly frivolous if, and only if, there is no rational argument to be made on the law or the facts. An appeal is not frivolous merely because an inadequately compensated appointed attorney believes that the case contains no issue which is likely to warrant reversal of the conviction. A truly frivolous appeal has no issue supported by the factual or procedural history of the case and is not of sufficient stature to warrant argument for a change in well settled law.

In all other situations the appellate courts should refuse appellate counsels' requests to withdraw and direct that the issues be briefed in the traditional adversarial manner. Appellate courts should specifically decline counsels' invitation to "independently review the record" except in those rare cases where the appeal is properly defined as frivolous.

ARGUMENT

I. The Ohio Courts' Failure To Require Strict Compliance With The Requirements Set Forth In *Anders v. California* Results In Unequal Treatment For Indigent Appellants And An Overall Degradation In The Quality Of Appellate Review.

An appeal is frivolous only when there is no rational argument to be made upon the law or the facts. *Coppedge v. U.S.* 369 U.S. 438, 448 (1962). This definition of frivolity developed out of a line of cases dealing with indigent federal appellants who were denied leave to appeal in *forma pauperis.* This Court has consistently held that:

> Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant...the request for leave to appeal in forma pauperis must be allowed.

Ellis v. U.S., 356 U.S. 674, 675 (1958).

The Constitution requires an appellate process open to both rich and poor on an equal basis. *Griffin v. Illinois,* 351 U.S. 12, 18-19 (1956). This requires the appointment of counsel for an indigent upon direct appeal. *Douglas v. California,* 372 U.S. 353 (1963). More than merely nominal representation is required. Every appellant is entitled

to the effective assistance of counsel on direct appeal.[1] *Evitts v. Lucey,* 469 U.S. 387 (1985). In order for counsel to be minimally effective in the constitutional sense he must play, "...the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *Anders* at 744. By definition an advocate advances and argues rational issues on behalf of his client.

In a very small number of cases there is simply no issue at all supported by the facts or procedural history of the case. *Anders* recognized this fact and in *dicta* described the procedure to be employed in such situations:

> Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

386 U.S. at 744.

This aspect of the *Anders* dicta, the briefing requirement, has been the subject of extensive criticism.[2] The experience in Ohio is that this requirement is often ignored. Nor do

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[1]At least minimally effective representation at this level is crucial since the indigent is entitled to free representation only on the first appeal. *Ross v. Moffit,* 417 U.S. 600 (1974).

[2]See Pengilly, *Never Cry Anders,* 9 Crim. Just. J. 45 (1986); Dougherty, *Wolf! Wolf! - The Ramifications of Frivolous Appeals,* 59 J. Crim. L. & Criminology 1 (1968); Herman, *Frivolous Criminal Appeals* 47 N.Y.U. L. Rev. 701 (1972); Mendelson, *Frivolous Criminal Appeals: The Anders Brief of the Idaho Rule?,* 19 Crim. L. Bul. 22 (1983).

the courts of appeal comply with the requirement of *Anders*. *Anders* holds that after independently reviewing the case if the court is satisfied of the frivolity of the appeal, then the court may:

> ...grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a determination on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it *must*, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

386 U.S. at 744. (Emphasis added).

In a substantial number of cases since 1981 the appellate courts in Ohio have identified arguable and therefore non-frivolous issues overlooked by counsel. In each of these cases the court proceeded to make a merit decision without affording the appellant counsel to brief and argue the issue. This abuse is universal and does not appear to be correlated to the presence of a constitutionally acceptable *Anders* brief. A detailed discussion of the findings of counsels' research follows.

A. *At least six appellate districts fail to comply with one or more of the requirements set forth in Anders v. California for the provision of counsel to press non-frivolous appeals on behalf of indigent appellants. This results in unequal treatment for indigent appellants and a degradation in the overall quality of appellate review.*

Penson's appointed attorney filed a one page motion seeking leave to withdraw and certifying in a conclusory fashion that he had, "... carefully reviewed the ... record ..." but "... found no errors requiring reversal, modification

and/or vacation ...". Joint Appendix at p. 24. This is the procedure typically followed in the Montgomery County Court of Appeals.[3] The second appellate district does not require counsel to comply with the briefing requirement established by this Court in *Anders v. California*. Often issues raised by appellant *pro se* are summarily overruled without discussion.[4] The court does undertake an independent review of the record, and occasionally does identify issues which have been overlooked by assigned counsel. In none of these cases has the court directed counsel to brief and argue the issue so identified. In *State v. Day* (11-24-86) Clarke App. No. CA 2141, unreported, Appellant raised six *pro se* issues all of which were arguable albeit unlikely to succeed. The Court found the first assignment meritorious but ruled the error was harmless.

In several cases the court has allowed "briefs" which raise only arguments against the appellant. *See State v.*

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[3]See Appendix B containing all "Anders" type cases from the second appellate district since 1981. The decisions in these cases as well as the unreported cases cited in the other appendices have been lodged with the Clerk.

In the following Montgomery County cases, appellate counsel filed "no merit" letters substantially identical to that which appellate counsel filed in the *Penson* case, to wit: *State v. Dorton* (11-25-87) Mont. App. No. CA10082; *State v. Monroe* (11-27-87) Mont. App. No. CA10124. These letters are also loged with the Clerk. As it did in *Penson*, the court refers to these letters as *"Anders"* briefs.

[4]Ohio R. of App. P. 12 (A) provides that the appeal must be determined on the merits of the assignments of error set forth by the brief. This would appear to require discussion rather than summary disposition by the court, but the second appellate district has not been consistent in this respect. See, eg: *State v. Brewer* (9-26-84) Mont. App. No. CA 8661, unreported; *State v. Wilson* (7-25-84) Mont. App. No. CA 1776, unreported; *State v. Ridner* (6-22-84) Mont. App. No. CA 8648, unreported; *State v. Wilson* (12-9-85) Clarke App. No. 1942, unreported.

Crockett (2-12-84), Mont. App. No. 8180, unreported; *State v. Brewer* (9-23-84), Mont. App. No. 8661, unreported; *State v. Ridner* (3-19-84), Mont. App. No. 8648, unreported; *State v. Smith* (8-10-87), Mont. App. No. 9818, unreported.

The second appellate district is not unique in its failure to appoint counsel to brief non-frivolous issues. This problem is present in the first,[5] fourth,[6] fifth,[7] sixth,[8] seventh,[9] and twelfth[10] Appellate Districts. Counsel have collected cases in the Appendices to this brief. The cases containing arguable issues discernable from the appellate court opinion or decision itself are identified by an † at the end of the citation.

The first and twelfth appellate districts expedite disposition of these cases by use of the accelerated calendar.[11] In a substantial number of cases there is no factual discussion. The decision is styled, "Memorandum Decision and Judgment Entry" and it is often impossible to determine even such minimal information as the identity of the crime charged.

Appendix A lists forty cases from the first appellate district. Amicus have inspected the file in each case. In each of these cases the court has described that which was

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[5]See Appendix A.
[6]See Appendix C.
[7]See Appendix D.
[8]See Appendix E.
[9]See Appendix F.
[10]See Appendix G.
[11]Ohio R. App. P. 11.1 provides in pertinent part, that:

> The accelarated calendar is designed to provide a means to eliminate delay and unnecessary expense in effecting a just decision on appeal by the recognition that some cases do not require as extensive or time consuming procedure as others.

filed by counsel as a "brief." However, these pleadings are simply factual discussions followed by a conclusion that no meritorious issue can be discerned. Counsel then invites independent review by the court. No issue is presented nor is any argument advanced on behalf of the client.

Independent review is undertaken and this occasionally results in the identification of issues overlooked by counsel.[12] However, no court has ever required counsel to brief an issue so identified by the court.

The failure to require briefs by counsel prior to reaching the merits has resulted in clearly erroneous judgments in several cases. Thus, in *State v. Yonus* (8-31-83) War. App. No. CA124, unreported, the court overruled three *pro se* assignments finding that they had no merit and were therefore frivolous.[13] In one assignment appellant complained that the state was allowed to introduce evidence of prior convictions during the state's case in chief and before the defendant had testified. The court found this issue frivolous. According to the court, carrying a weapon under disability, (Ohio Revised Code §2923.13) requires proof,

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[12]In *State v. Johnson* (10-20-82) Ham. App. Nos. C810925 & 810965, two issues were raised by appellant *pro se*. The court reversed on the first assignment. The second assignment raised an ineffective assistance of appellate counsel claim. The court refused to address this issue, "... as it is not properly brought in this appeal from the actions of the court below." *Id.* at 4.

It is interesting to note that in a subsequent unreported decision this appellate court ruled that an ineffective assistance of appellate counsel claim could not be raised collaterally in a post-conviction proceeding under Ohio Rev. Code §2953.21. See *State v. Rhone* (8-31-83) Ham. App. No. C820640, unreported. This case is lodged with the Clerk. The implication seems to be that ineffective assistance of appellate counsel may not be raised either directly or collaterally in the first appellate district.

[13]See discussion infra at II.

"... that the defendant had previously been convicted of a crime of violence, to wit: breaking and entering." *Id.* at 3. However, breaking and entering (Ohio Revised Code §2911.13) is not an offense of violence under Ohio law.[14]

In *State v. Cox* (10-29-84) Cle. App. No. CA 84-04-034, unreported, counsel could find no error in the record and requested that the court conduct an independent review. The examination by the court revealed, "... the following potential error: Did the trial court err in revoking appellant's probation and imposing sentence without first having entered a judgment entry of record reflecting a finding of guilt on the part of appellant?" *Id.* at 5. This "Memorandum Decision" requires ten (10) pages to explain why this, "potential error ... did not substantially prejudice the rights of appellant." *Id.* at 8. In the course of rationalizing its decision the court revealed that appellant was granted treatment in lieu of conviction under R.C.

[14]Ohio Revised Code §2901.01(I) defines "Offense of violence" as:

(1) A violation of sections 2903.01, 2903.02, 2903.03, 2904.04, 2903.11, 2903,12, 2903.13, 2903.21, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.12, 2909.02, 2909.03, 2909.04, 2909.05, 2911.01, 2911.02, 2911.11, 2911.12, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.34, 2921.35, 2923.12, and 2923.13 of Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section listed in division (I)(1) of this section;

(3) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(4) A conspiracy or attempt to commit, or complicity in committing any offense under division (I)(1), (2), or (3) of this section.

§2951.041.[15] The trial court nevertheless made a verbal judgment of guilt at the hearing which was not journalized. Subsequently, two more hearings took place with the ultimate result that the defendant was ordered to serve an increased sentence of one and one half years in prison. The appellate court did not address the fundamental question of whether the trial court's failure to adhere to the statutory procedure voided the initial grant of treatment in lieu of conviction and entitled appellant to reinstatement of her not guilty plea.[16]

In *State v. White* (10-25-83) Col. App. Nos. 82-C-66 & 67, appellant was convicted of D.U.I. and falsification. The falsification charge was based upon a verbal misidentification to a police officer. However, the Ohio Supreme Court has twice held that an unsworn statement to a police officer cannot support a conviction under Ohio's falsification statute.[17]

Failure to adhere to the *Anders* requirements degrades the quality of appellate review received by the parties.

[15]Ohio law provides for two alternatives to incarceration if the court finds that the person charged with crime is or is in danger of becoming a "drug dependent person". O.R.C. §2951.041 is entitled "Treatment in lieu of conviction". This procedure takes place after a plea of guilty or no contest but before a judgment is rendered on the plea and stays the criminal proceeding. O.R.C. §2951.04 entitled "Conditional Probation of a Drug Dependent Person" is a traditional type of probation and merely stays the execution of a sentence imposed after conviction.

[16]Ohio courts have held that special statutory procedures must be strictly construed, and that a trial court's failure to comply with the procedural requirements divests the court of jurisdiction to proceed under the statute. State, ex rel. *Dallman v. Court of Common Pleas*, 32 Ohio App. 2d 102 (1972); *State v. Delaney* (1983), 9 Ohio App. 3d 97; *State v. Ellington* 36 Ohio App. 3d 76 (1987).

[17]See *Columbus v. Fisher*, 53 Ohio St. 2d 25 (1978); *Dayton v. Rogers*, 60 Ohio St. 2d 162 (1979).

Most often it is the defendant who is prejudiced. In some cases, however, it is the state. In *State v. Acklin* (9-27-84) Sum. App. No. 11679, unreported, counsel sought to withdraw and the court affirmed both the conviction (aggravated burglary and attempted rape) as well as the sentence of, "... seven to fifteen years in prison." *Id.* at 2. However, aggravated burglary (O.R.C. §2911.11) is a first degree felony under Ohio law and requires imposition of an indefinite sentence with a maximum term of *twenty-five* not fifteen years.

Some jurists have expressed concern about the adequacy of the procedures in these cases. For example, in *State v. Saunier & DeVille* (5-27-83) Col. App. No. 82-C-64 & 65, unreported, appellate counsel jointly represented both defendants. Counsel could find no issues in the record and moved to withdraw. In a two to one decision DeVille's conviction was affirmed but Saunier's conviction was reversed for want of any evidence connecting him with the crime. The dissenter would have denied counsel's motion to withdraw and required that the case be briefed.[18]

B. *The "independent review" conducted by the court is, by itself, an inadequate substitute for strict compliance with Anders.*

The Ohio Supreme Court has never decided a case construing *Anders* and establishing Ohio procedures. Two reported cases appear to require nominal compliance with *Anders*. See *State v. Duncan* 23 Ohio App. 2d 203 (1978);

[18]*See also State v. Watts* (9-27-85) Lucas App. No. L-84-218 (conviction affirmed by a 2 - 1 vote); *State v. Foley* (9-20-85) Lucas App. No. L-85-076 (conviction affirmed by a 2 - 1 vote); *State v. Townsend* (8-5-83) Lucas App. No. L-79-090 (conviction affirmed with only 2 judges participating); *State v. Monroe & Scott* (2-5-85) Scioto App. Nos. 1335 & 1336, (conviction affirmed over dissent with opinion).

State v. Toney 23 Ohio App. 2d 203 (1970). In practice, however, strict compliance is not required by at least half the appellate districts.[19] The appellate courts generally seek to substitute the "independent review" procedure for the briefing process even though *Anders* clearly requires both. See, for example, *Freels v. Hill*, No. 87-3016, slip op. (6th Cir. April 6, 1988) discussed *infra; State v. Ridner* (6-24-84), Mont. App. No. CA8648, unreported.

In *State v. Toney* the seventh appellate district interpreted *Anders* as requiring "conscientious examination" of the record by counsel. An *Anders* brief and motion are filed when counsel, "... with long and extensive experience in criminal practice..." concludes the appeal frivolous and without an issue, " ... which could be arguably supported on appeal ...". *Toney* at headnotes. The court then will independently review the record, allowing *pro se* participation if the appellant chooses, in order to determine whether the appeal is wholly frivolous. If it is determined wholly frivolous a motion for new counsel is denied, the motion to withdraw is granted and the judgment of the trial court is affirmed.

However, the seventh appellate district has been unable to consistently apply these procedures. See *State v.*

[19]See Appendices A-G. In addition, the Tenth Appellate District required strict compliance with *Anders* only after the Federal District Court for the Southern District of Ohio granted a Writ of Habeas Corpus in favor of an indigent appellant whose attorney filed a "no merit" brief in his behalf which raised no issues and did not explain why the appeal was frivolous. *Laws v. Jago*, No. C-1-78-64, U.S. Dist. Court, S.D. Ohio, W.D. (Feb. 25, 1980). In the Eighth Appellate District (Cuyahoga County) the County Public Defender's Office simply does not file *"Anders"* briefs at the informal request of the Appellate Court. Both Franklin and Cuyahoga counties now informally follow the Idaho "no withdrawal" rule. *State v. McKenney*, 98 Idaho 551, 568 P. 2d 1213 (1978).

Saunier & DeVille, supra. In several cases since 1981 the court has found arguable issues in the record but failed to require briefs from counsel.[20] Nor has the court's "independent review" always included the entire record. In *State v. Scott* (8-7-87) Bel. App. No. 86-B-35, unreported, the court did not review the transcript of the preliminary hearing. It was not included in the record on appeal. This omission was used to overrule appellant's *pro se* assignment referring to that hearing. *Id.* at 6-7. In *Village of Columbiana v. Bussard* (4-27-87) Col. App. No. 86-C-14, unreported, the court independently reviewed the D.U.I. conviction. The record contained only a "statement of facts in lieu of transcript". Counsel sought leave to withdraw. Appellant filed a letter *pro se* contradicting the "approved statement" in certain particulars. The court overruled one "potential assignment of error" (*Id.* at 4) on the basis of waiver. The court noted that the "statement of facts in lieu of transcript" contained no opinion testimony that appellant had been driving while intoxicated. Nevertheless, the court presumed, "... regularity on the part of the trial court", leave to withdraw was granted and the judgment of conviction affirmed. *Id.* at 5.

Anders requires an independent review the case to determine whether the appeal is in fact frivolous. The court must first have the benefit of counsel's brief directing it to anything in the record that could give rise to a colorable claim. However, the Ohio courts have put too great a burden on their independent review. The first appellate

[20]See *State v. Wright* (12-13-85) Col. App. No. 84-C-56; *State v. McHenry* (6-17-86) Harr. App. No. 394; *State v. Smothers* (4-23-86) Bel. Nos. 84-B-51 & 52; *State v. Valentine* (1-24-86) Col. App. No. 85-C-15; *State v. Bowers* (10-20-83) Jeff. App. No. 82-J-8; *State v. Malmsberry* (6-17-83) Col. App. No. 82-C-54; *State v. Hocker* (7-15-81) Bel. App. No. 80-B-23; *State v. Salina* (3-31-81) Col. App. No. 80-C-24.

district has allowed appointed counsel in forty cases since 1981 to file "briefs" containing factual discussions but no argument whatsoever.[21] In some cases the client's *pro se* letter or brief is appended. Arguable claims were identified in some of these cases. However, the court proceeded to rule on the merits without requiring briefs. Further, in each of these cases the court specifically found that, "... there were reasonable grounds for this appeal ..." and allowed, "no penalty".

The Sixth Circuit Court of Appeals has recently condemned the procedure employed by the Hamilton County Court of Appeals. In *Freels v. Hill,* No. 87-3016, slip op. (6th Cir. April 6, 1988), the District Court had dismissed the petition seeking federal habeas relief which claimed violation of the right to effective assistance of counsel on direct appeal. The District Court required proof of prejudice, found none and denied relief. The Sixth Circuit expressly rejected a proof of prejudice requirement and reversed the District Court. The opinion makes specific reference to the fact that the first appellate district does not require compliance with *Anders:*

> It is our observation that Freel's case is unfortunately not unique and that the advantages and requirements of *Anders,* although straight-forward, are often ignored.

Id. at 12.

As Appendix A illustrates, there is factual support for the Circuit Court's observation. But, the problem is by no means confined to Hamilton County. The twelfth appellate district is far less consistent than the first in requiring

[21]See Appendix A.

briefs prior to the independent review.[22] In addition, several cases proceeded to decision with but one brief having been filed.[23] As in the first appellate district, these cases also contain specific factual findings that, "...there were reasonable grounds for this appeal...".[24]

Amicus have found no case where the court, identified a nonfrivolous issue and required briefing prior to rendering a decision on the merits. Additionally a substantial number of cases deemed "frivolous" by counsel and accepted as such by the reviewing court appear to present some colorable or arguable claim simply from the court's own description of the case in the opinion. These cases are identified in Appendices A - G by an † at the end of the citation.

C. *The effect of noncompliance is a de facto denial of direct appeal which impacts disproportionately on indigent appellants.*

The system of justice in this country is adversarial. This is a first principle and not subject to rational dispute. Where an issue is fairly joined, the court determines the justice of the matter with the law and facts provided by the adversaries in support of their respective positions. The process is particularly important to the appellant in a criminal case who bears a heavy burden when seeking to set aside his conviction. But when counsel is required neither to initially brief the case nor subsequently to address issues

[22]See Appendix G.

[23]See eg. *State v. Elam* (8-4-86) But. App. No. CA 86-02-023; *State v. Dingus* (4-14-86) Mad. App. No. CA 85-11-035; *State v. Gilbert* (9-8-86) Cle. App. No. CA 86-02-013; *State v. Osborne* (9-30-85) War. App. No. CA 85-04-019; *State v. Denny* (1-17-84) But. App. No. CA 83-06-056; *State v. Twyman* (2-21-84) Fay. App. No. CA 83-10-022.

[24]See *Freels (supra)* at 13, n. 5.

determined to be nonfrivolous, the process loses its adversarial character.[25]

Because the vast majority of these cases are indigent appeals, the process clearly weighs most heavily against those least able to defend themselves. In fact, counsel for Amicus have not been able to document a single instance where a retained attorney has found the client's appeal to be wholly frivolous and moved to withdraw. The suggestion that the *Anders* procedure gives the indigent appellant an advantage over the monied appellant[26] is an ivory tower hypothesis. The stark reality is the mass of faceless appeals abandoned by counsel and disposed of by the court with a flick of the pen. The experience in Ohio over the last seven years unequivocally proves that poverty is no advantage on appeal.

[25]As documented in Appendix G in the twelfth appellate district alone merit decisions were reached in some thirty cases where but one "brief" was filed. These briefs are in fact "no merit letters" akin to what was filed in Penson's behalf and was specifically disapproved in *Anders v. California.* See briefs lodged with the Clerk in the following cases: *State v. Gilbert* (9-8-86) Cle. App. No. CA86-02-013; *State v. Barnes* (11-13-84) Cle. App. No. CA84-04-033; *State v. McClendon* (5-25-83) Cle. App. No. 83-01-003; *State v. McHaffie* (4-13-86) Cle. App. No. CA 1181; *State v. Cisco* (6-18-84) Cle. App. No. CA84-01-002; *State v. Alsip* (1-30-84) Cle. App. No. 83-07-061; *State v. Gregory* (2-10-82) Cle. App. No. 1020; *State v. Kendrick* (5-4-83) Cle. App. No. 1182; *State v. Cox* (10-29-84) Cle. App. No. CA84-04-034.

[26]See Comment, *Constitutional Law - Criminal Appellate Procedure - Right to Counsel,* 2 Whittier L. Rev. 757, 772 (1980)

II. The Definition Of A "Frivolous Appeal" Has Been Expanded To Encompass All Issues Which, In Counsel's Opinion, Are Unlikely To Result In Reversal On Appeal.

In Ohio practice the working definition of a "frivolous appeal" is an appeal in an indigent's case which, in counsel's opinion, contains no issue that is likely to result in reversal of the conviction.[27] In the course of researching this issue counsel have reviewed over two hundred unreported decisions. In a large number of cases it is impossible to glean any information from the "opinion" or "decision" of the reviewing court. However, in those cases with factual discussions, counsel for Amicus have identified a substantial number[28] containing issues which are clearly litigable. Of course these issues are unlikely to succeed. But that fact adds nothing to the discussion. The vast majority of all appeals from convictions are affirmed. Stating that an issue on appeal is unlikely to result in reversal is but another way of identifying the appellant as the defendant at trial.

The expansion of the definition of frivolity has been assisted by the appellate courts. Numerous decisions and opinions have either indirectly[29] or directly held the appeal

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[27]See *State v. Paker* (1-30-87) Lucas App. No. L-86-240, unreported, "... counsel for appellant has set forth two issues ... but has concluded ... that an appeal based thereon would not be meritorious and as a result would be wholly frivolous." *Id.* at 2. See also cases cited at n.30 *infra.*

[28]See Appendices A - G.

[29]As noted *supra* every decision in both the first and twelfth appellate district contains a determination by the court that there were reasonable grounds for the appeal. Yet in none of these cases was counsel directed to brief an issue either raised *pro se* or identified by the court. It would appear then that an appeal is frivolous (as concluded by counsel) so long as the conviction is not reversed by the court. Apparently it is

(Continued on next page)

frivolous because the issue did not require reversal. Thus, in *State v. Jordan* (3-20-87) Wood App. No. WD-86-45, unreported, counsel filed a motion to withdraw and a brief which directed attention; to various rulings on defense objections, to manifest weight of the evidence, and to the effectiveness of trial counsel. Appellate counsel had also represented appellant at trial. Not surprisingly then, the merit brief argued that the erroneous rulings were harmless, the evidence was sufficient, "though not overwhelming" (*Id.* at 3) and that the assistance he had provided to his client satisfied the Sixth Amendment. The reviewing court agreed that the trial court's admission of hearsay was harmless error, that the evidence was sufficient, and that while, "... the prosecution's repeated references to Jordan's prior convictions ... do appear excessive, we find that such references were not prejudicial." *Id.* at 3. Having thus disposed of the case the court concluded, "... that counsel's arguable bases [sic] for appeal are without merit. Accordingly, the appeal is frivolous and counsel's request for leave to withdraw is hereby granted." *Id.* at 4-5.[30]

(Continued)
possible for an appeal to be frivolous even when the court does reverse the conviction. See *State v. Johnson* (1st App. Dist.) discussed *supra* at n. 12.

[30]See also *State v. Lutchey* (1-30-87) Lucas App. No. L-86-145; *State v. Lee* (1-24-86) Lucas App. No. L-85-250; *City of Toledo v. Foley* (9-20-85) Lucas App. No. L-85-076; *State v. Garcia* (6-7-85) Wood App. No. 84-CR-63; *State v. Fletcher* (1-25-85) Erie App. No. E-84-13; *State v. Brewster* (6-29-84) Lucas App. No. L-84-070; *State v. Sorrell* (9-30-83) Sand. App. No. S-83-12; *State v. Townsend* (8-9-83) Lucas App. No. L-79-090; *State v. Monroe* (6-17-83) Lucas App. No. L-83-055; *State v. King* (1-21-83) Lucas App. No. L-82-292; *State v. Taylor* (12-17-82) Lucas App. No. L-82-092; *State v. Toyer* (5-7-82) Lucas App. No. L-81-358; *State v. Moore* (3-6-81) Lucas App. No. L-80-214.

In some cases counsel has been allowed to withdraw upon concluding that the case contained, "...no meritorious, appealable issue...".[31] In these cases the court substitutes its independent review of the record for the advocacy required by *Anders.*

The effect of routinely allowing appointed counsel to withdraw in these cases is significant. The right of an indigent appellant to an active advocate to advance his cause on direct appeal is substantially restricted when it is guaranteed only in those cases warranting reversal. This is clearly the trend, however. In *State v. Belton* (11-27-87) Mont. App. No. 10037, unreported, withdrawal by counsel was permitted where it appeared, "...the only possible issues bearing some arguable merit would have been harmless beyond a reasonable doubt." *Id.* at 1. In *State v. Sykes* (1-26-84) Mah. App. No. 82-CA-115, unreported, counsel was allowed to withdraw after concluding that there was, "...no arguable prejudicial error..." in the case.

And in the twelfth appellate district appointed counsel are routinely granted permission to withdraw where it appears that there are, "...no errors in the proceedings below that are prejudicial to the rights of the appellant...".

[31]*See, e.g., State v. Ridner* (6-22-84) Mont. App. No. 8648; *State v. Chapman* (2-16-84) Mont. App. No. 8129; *State v. Brewer* (6-26-84) Mont. App. No. 8661; *State v. Crockett* (2-17-84) Mont. App. No. 8180; *State v. Ellis* (9-17-84) Mont. App. No. 8800; *State v. Wilson* (12-9-85) Mont. App. No. 1942; *State v. Ysaguirre* (3-21-86) Sand. App. NO. 84-CR-906; *State v. Foley* (9-20-85) Lucas App. No. L-85-076; *State v. Lutchey* (1-30-87) Lucas App. No. L-86-145; *State v. Paker* (1-30-87) Lucas App. No. L-86-240; *State v. Rolins* (9-30-86) Lucas App. No. L-86-051.

This language is present in every case listed in Appendix G.[32]

III. A Frivolous Appeal Is An Appeal Where There Is No Issue Whatsoever Supported By The Factual Or Procedural History Of The Case Which Is Arguable Or Colorable, And Where The Case Is Not Of Sufficient Stature To Warrant Argument For A Change In Settled Law. An Appeal Is Not Frivolous Simply Because The Issue Is, In Counsel's Opinion, Unlikely To Succeed.

The Court in *Anders* did not define the phrase "frivolous appeal". The working definition employed by appointed counsel in Ohio is that a frivolous appeal is one in which the appellate court is unlikely to reverse. In this case, which is not atypical, Penson's appellate counsel found in his review of the record no errors requiring reversal, modification, and/or vacation of the verdict or sentence; he then certified that the appeal was meritless. *Amicus curiae* submits that a frivolous appeal, as contemplated in *Anders,* should not be equated with an appeal in which a criminal conviction is unlikely to be reversed. This Court should provide guidance to the lower courts and the appellate bar on the indicia of a frivolous appeal.

After *Anders* courts and commentators have wrestled, with mixed results, with the concept of frivolous appeals. Some see *Anders* as having distinguished between merely meritless appeals (from which counsel may not withdraw) and wholly frivolous cases (from which counsel may withdraw.) See, *e.g.* 1 ABA Standards for Criminal Justice,

[32]Each of these cases also contains a finding by the court that "...there were reasonable grounds for this appeal." Cases containing this language are identified in the Appendices by an asterisk following the citation.

Standard Ch. 4, §4 - 8.3 Commentary at 4 - 110 (2d Ed. 1980); Pengilly, *Never Cry Anders,* 9 Crim. Just. J. 45, 50 (1986). Others either reject this reading of *Anders,* see Note, *Withdrawal of Appointed Counsel from Frivolous Indigent Appeals,* 49 Ind. L.J. 740, 747 and n. 32 (1974); *State v. Horine,* 64 Or. App. 532, 669 P. 2d 797, 801-02 and n. 3 (1980), or find the distinction too fine, *Sanchez v. State,* 85 Nev. 95, 98, 450 P. 2d 793, 795 (1969); Hermann, *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701, 705 (1970), or nonexistent. *Cleghorn v. State,* 55 Wisc. 2d 466, 475, 198 N.W. 2d 577, 582 (1972); *Pengilly, supra.* This disparity in interpretation of *Anders* has resulted in unequal treatment of indigent appellants depending upon where the "frivolous" line is drawn by the local courts. Much of the criticism of *Anders* would be blunted by this Court's clarification of the meaning of "wholly frivolous" cases. This Court needs to provide a meaningful basis for distinguishing "frivolous" cases from those which must be briefed on the merits by counsel. See *Hermann, supra* at 718, 721.

In a case which preceded *Anders,* this Court stated that if a criminal appellant made a rational argument on either the law or the facts, the appeal was not frivolous. *Coppedge v. United States,* 369 U.S. 438, 448 (1962). See Comment, *Constitutional Law -Criminal Appellate Procedure - Right to Counsel,* 2 Whittier L.R. 757, 766, 767 (1980). The litigant need not show that he was likely to prevail ultimately. *Id. Coppedge* presents in its simplest form, the test that *amicus* urges this Court to adopt. See also *State v. Horrine, supra* (a non-frivolous issue is one "for which a reasonable argument can be made, including suggested changes in the law.")

In a widely cited article, *Hermann* discusses the concept of frivolous appeals consistently with the *Coppedge* formulation. *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701 (1970). *Hermann* provides a concrete description of a frivolous appeal (*Id.* at 707):

> It is an appeal with all or most of the following attributes: It is a loser, not just a probable loser, but a clearly hopeless loser, in the judgment of counsel who has read the record and researched the law. The record contains few, if any, motions or objections by defense counsel. No novel matter of constitutional law or statutory interpretation was raised below or is presented by the facts. The evidence of guilt is so overwhelming that most errors, even if clearly shown to be such, would have to be regarded as harmless ones. There is no evidence on or outside the record of official misconduct or overreaching tactics by the police or prosecution. Nothing which might strike a sympathetic chord in a reasonable person, either with regard to the defendant's character or his involvement in the crime, is presented by the facts of the case. The only matters even tenuously assignable as error are evidentiary rulings which pertain to matters of small consequence, were not objected to in the trial court or can be faulted only by an abstruse exegesis of the law. During the trial, the judge did not conduct himself unseemingly or as an advocate for the prosecution; later, he delivered without objection a bland, technical charge to the jury, not attempting to marshal the evidence on either side. [Footnotes omitted.]

Hermann criticizes other proposed tests of frivolity as too broad. The test should not be merely that counsel is subjectively unimpressed with the merits of the case or that counsel believes the conviciton will be affirmed by the

appellate court. *Id.* at 706. The odds of a criminal defendant winning a reversal on appeals are too high for the employment of an outcome - determinative test.

A frivolity test drawn from *Coppedge* would be consistent with the appellate attorney's ethical obligations to refrain from advancing frivolous claims to the court. See Ohio Code of Professional Responsibility (1970), Ethical Consideration EC 7-4:

> The advocte may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

See also DR 7-102:

> (A) In his representation of a client, a lawyer shall not:
>
> (2) Knowlingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Cf. DR. 2-110 (1979). Under the *Coppedge* test appellate counsel act ethically by filing merit briefs in cases where a rational argument can be made, and by moving to withdraw in cases where it cannot.

The approach taken by Ohio appellate courts and counsel, that a frivolous case is any case in which the conviction is unlikely to be reversed, is inconsistent with

Coppedge and has been justifiably criticized. *Hermann* at 706. Such a test is meaningless because of the low reversal rate in criminal cases. *Id.; Pengilly, supra* at 50 and n. 30. The employment of this "unlikely to prevail on the merits" test has resulted in the denial of the constitutional right to counsel on appeal for too many indigent Ohio criminal appellants.

CONCLUSION

At least half the appellate districts in Ohio do not require compliance with *Anders*. Enforcement of the constitutional right to at least minimally effective assistance of counsel on direct appeal has been lax and, in some cases, nonexistent. In addition, there has developed a clear trend on the part of both counsel and the courts to expand the definition of frivolity. The present definition comprehends any issue in an indigent's case which counsel feels bears little chance of winning reversal. This definition includes not only issues which the court would likely find meritless, but also issues which the court would find to be error albeit harmless.

There are two obvious flaws with such a definition, both of which have far reaching consequences. First, the definition turns *Anders* and the concept of frivolity on its head. Rather than being the rare exception, the vast majority of criminal appeals are properly labeled frivolous. This broader definition does nothing to solve the "dilemma" an attorney faces when complying with the briefing requirement set by *Anders*. In fact, the dilemma becomes worse because it must be faced more frequently.[33]

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[33]The definition of a frivolous appeal proposed herein eliminates the controversy surrounding the Wisconsin "discussion rule" recently considered by this Court in *McCoy v. Wisconsin*, Sup. Crt. Case No 87-

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Second, the definition destroys the adversarial character of the criminal appellate process. In so doing it eliminates the only engine for change and guarantees stagnation. If only successful appeals are nonfrivolous then there is no motivation to argue for a new or novel interpretation, or for a change in settled principles. Counsel is, in fact, ethically prohibited from doing so. The law is frozen into its present pattern, and *stare decisis* becomes the only force in the legal universe.

It is inconceivable that this Court would intend such a result. Yet, this result is the irrefutable consequence of the expanding definition of frivolity. The Ohio appellate courts have approved this definition. They have encouraged the expansion of the definition by consistently granting counsel leave to withdraw in cases with nonfrivolous issues. Independent review by an appellate court is an inadequate substitute for advocacy. This Court should act to preserve the adversarial nature of the appellate process. To do otherwise would be to change that which is most basic in our system of justice. Such a change will not benefit anyone, and could very well hurt us all.

(Continued)

5002. In a truly frivolous appeal, one does not advocate against the client because there is only one side. This will usually take the form of an explanation of the facts or procedural history, the truth of which negates the existence of a claimed issue. For example, in an appeal of a guilty plea the client might assert that he was not advised of his rights prior to waiving them. Upon review of the transcript counsel may discover that the client was in fact properly advised by the court. Where no other error is asserted or revealed, an appeal in this situation would be frivolous, counsel should so advise the court and the appeal should be dismissed after the court satisfies itself that counsel has not overlooked an issue.

Respectfully submitted,

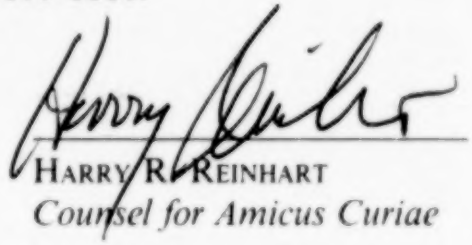
GLORIA A. EYERLY, ESQ.
Counsel of Record
490 South High Street
Columbus, Ohio 43215
(614) 462-3960

HARRY R. REINHART, ESQ.
536 South High Street
Columbus, Ohio 43215
(614) 488-8528

Counsel For Amicus Curiae

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I Harry R. Reinhart, a member of the bar of this Court, hereby certify that on this *20th* day of *April, 1988*, three copies of the foregoing Brief for the Ohio Association of Criminal Defense Lawyers as Amicus Curiae In Support of Petitioner were mailed, first class postage paid, to Gregory Ayers, Esq., Eight East Long Street, 11th Floor, Columbus, Ohio, 43266-0587, Counsel for Petitioner; Mark B. Robinette, Esq., 20 East Tabb Street, Suite 101, Petersburg, Virginia 23803, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Steven Anthony Penson's address is K-3-56, #182-582, Southern Ohio Correctional Facility, P.O. Box 45699, Lucasville, Ohio 45699-0001.



HARRY R. REINHART
Counsel for Amicus Curiae

APPENDIX

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LEGEND FOR APPENDICES A THROUGH G

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

† Indicates presence of an arguable issue discernable from the opinion lodged with the Clerk.

* Indicates finding of reasonable grounds for the appeal by the court.

# Indicates State filed no brief.

° Indicates opinion contains conclusion that appeal is frivolous because the issue does not warrant reversal.

¢ Indicates split (i.e. 2-1) decision.

@ Indicates that the "no merit brief" is lodged with Clerk along with the opinion.

$ Indicates that the "independent review" was conducted by the court upon an incomplete record.

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APPENDIX A

FIRST APPELLATE DISTRICT
(Hamilton County, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Sexton (7-1-81) Ham. App. No. C800557†, *

State v. King (3-24-82) Ham. App. No. C810404†, *

State v. Neely (3-24-84) Ham. App. No. C810346†, *

State v. Heath (4-7-82) Ham. App. No. C810407*

State v. Bush (4-14-82) Ham. App. No. C810428*

State v. Coleman (6-2-82) Ham. App. Nos. C810497, C810499*

State v. Mitchell (6-2-82) Ham. App. No. C810548*

In re Powell (7-7-82) Ham. App. No. C810661*

State v. Gentry (7-28-82) Ham. App. No. C-810677*

State v. Jackson (8-11-82) Ham. App. No. C-810899*

State v. Browner (8-18-82) Ham. App. No. C81088*

State v. Bryant (8-25-82) Ham. App. No. C810924*

State v. Johnson (10-20-82) Ham. App. Nos. C810925, C810965*

State v. Woodrum (1-26-83) Ham. App. No. C820273*

State v. Austin (2-2-83) Ham. App. No. C820430*

State v. Steed (2-23-83) Ham. App. No. C820358*

State v. Murphy (3-16-83) Ham. App. No. C820401*

State v. Claxton (1-9-83) Ham. App. No. C820259*

State v. Morton (7-13-83) Ham. App. No. C820851*

State v. Reynolds (12-7-83) Ham. App. No. C830182*

State v. Harris (2-1-84) Ham. App. No. C830335, C830344*

State v. Campbell (2-15-84) Ham. App. No. C830366*

State v. Lainhart (4-4-84) Ham. App. Nos. C830502, C830510, C830511*

State v. Freels (4-4-84) Ham. App. No. C830585*
State v. Law (7-25-84) Ham. App. No. C830890*
State v. Parlier (9-26-84) Ham. App. No. C830543*
State v. McDermott (12-26-84) Ham. App. No. C840181*
State v. Greer (12-26-84) Ham. App. No. C840279*
State v. Burkett (2-20-85) Ham. App. No. C840031*
State v. Love (4-3-85) Ham. App. No. C840352*
State v. Green (5-9-85) Ham. App. No. C840616*
State v. Sutton (6-12-85) Ham. App. No. C840740*
State v. Taylor (9-4-85) Ham. App. No. C840912*
State v. Fairbanks (11-27-85) Ham. App. No. C850084*
State v. Robinson (1-14-87) Ham. App. No. C860223*
State v. Wilson (1-21-87) Ham. App. No. C860221*
State v. Hayes (1-30-87) Ham. App. No. C860267*
State v. Bush (2-12-87) Ham. App. No. C860352*
State v. Jackson (7-1-87) Ham. App. No. C860768*
State v. Howard (7-8-87) Ham. App. No. C860754*

APPENDIX B

SECOND APPELLATE DISTRICT
(Darke, Miami, Champaign, Clarke, Greene & Montgomery Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Humphrey (6-24-83) Clark App. No. 1799
State v. Chapman (2-16-84) Mont. App. No. 8129
State v. Crockett (2-17-84) Mont. App. No. 8180 @, *
State v. Ridner (6-22-84) Mont. App. No. 8648 @, *
State v. Wilson (7-25-84) Clark App. No. 1776
State v. Pearson (8-7-84) Greene App. No. 83-CA-67, *
State v. Brewer (9-26-84) Mont. App. No. CA 8661, @
State v. Ellis (9-27-84) Mont. App. No. 8800, *
State v. Wilson (12-9-85) Clark App. No. CA-2060
State v. Day (11-24-86) Clark App. No. CA-2141, *
State v. Seebeck (5-14-84) Clark App. No. CA-2243, *
State v. Penson (6-5-87) Mont. App. No. CA-9193, *
State v. Penson (6-9-87) Mont. App. No. CA-9193, *
State v. Riggins (6-17-87) Clark App. No. CA-2305
State v. Tooson (6-18-87) Clark App. No. CA-2137
State v. Rhyan (6-18-87) Clark App. No. CA-2213
State v. Glascoe (1-27-87) Mont. App. No. 10221, @
State v. Smith (8-10-87) Mont. App. No. 9818, @
State v. Dorton (11-25-87) Mont. App. No. 10082, @
State v. Monroe (11-27-87) Mont. App. No. 10124, @
State v. Hefflin (1-26-88) Mont. App. No. 10456

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APPENDIX C

FOURTH APPELLATE DISTRICT
(Pickaway, Hocking, Athens, Washington, Ross, Vinton, Meigs, Highland, Pike, Jackson, Gallia, Adams, Scioto & Lawrence Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Monroe (2-5-82) Scioto App. No. 1335, †

State v. Scott (2-5-82) Scioto App. No. 1336

State v. Grove (3-12-82) Wash. App. No. 79-CA-26

State v. Kilgore (8-25-82) Athens App. No. 1108

State v. Burke (10-2-82) Gallia App. No. 81-CA-9, †

State v. Caldwell (11-10-82) Ross App. No. 924

State v. Crestinger (2-9-83) Ross App. No. 948, †

State v. Campbell (7-28-83) Wash. App. No. 81-X-11, †

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APPENDIX D

FIFTH APPELLATE DISTRICT
(Richland, Ashland, Holmes, Stark, Morrow, Knox, Coshocton Tuscarawas, Delaware, Licking, Muskingum, Guernsey, Fairfield, Perry & Morgan Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Parrish (11-4-86) Knox App. No. 86-CA-12

State v. Mann (11-10-86) Stark App. No. CA-6923

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APPENDIX E

SIXTH APPELLATE DISTRICT
(Erie, Huron, Williams, Fulton, Wood, Ottawa Sandusky & Lucas Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Graddy (2-13-81) Lucas App. No. L-80-203, °
State v. Moore (3-6-81) Lucas App. No. L-80-214, †, °
State v. Rogers (3-27-81) Lucas App. No. L-80-217, †
State v. Cooper (5-22-81) Lucas App. No. L-80-327
State v. Dotson (12-24-81) Lucas App. No. L-81-19
State v. Gregory (12-24-81) Lucas App. No. L-81-197, †
State v. Hartsel (4-30-82) Sandusky App. No. S-81-37, †
State v. Toyer (5-7-82) Lucas App. No. L-81-358, †, °
State v. Simms (7-30-82) Wood App. No. WD-82-26
State v. Crenshaw (11-19-82) Lucas App. No. L-82-179, †
State v. Taylor (12-17-82) Lucas App. No. L-82-092, °
State v. King (1-21-83) Lucas App. No. L-82-292, †, °
State v. Cann (6-3-83) Lucas App. No. L-83-068
State v. Monroe (6-17-83) Lucas App. No. L-83-055, °
State v. Townsend (8-5-83) Lucas App. No. L-79-080, †, °
State v. Sorrell (9-30-83) Sandusky App. No. S-83-12, †, °
State v. Brewster (6-29-84) Lucas App. No. L-84-070, °
State v. Duck (7-6-84) Lucas App. No. L-83-390
State v. Hickman (1-25-85) Erie App. No. E-84-13, †, °
State v. Fletcher (4-26-85) Lucas App. No. L-84-161, °
State v. Garcia (6-7-85) Wood App. No. WD-84-99, °
City v. Foley (9-20-85) Lucas App. No. L-85-076, †, °
State v. Watts (9-27-85) Lucas App. No. L-84-218, †, ¢
State v. Lee (1-24-86) Lucas App. No. L-85-250, †, °
State v. Fisher (2-21-86) Lucas App. No. L-85-274, °
State v. Barnett (3-21-86) Wood App. No. WD-85-63

State v. Ysaguirre (3-21-86) Sandusky App. No. S-85-31, °

State v. Harget (6-20-86) Lucas App. No. L-85-367, #

State v. Burns (6-20-86) Lucas App. No. L-85-368, #

State v. Rollins (9-30-86) Lucas App. No. L-86-051, #

State v. Robinson (12-5-86) Sandusky App. No. S-86-33, †

State v. Paker (1-30-87) Lucas App. No. L-86-240, †, °

State v. Lutchey (1-30-87) Lucas App. No. L-86-145, °

State v. Jordan (3-20-87) Wood App. No. WD-86-45, †, °

APPENDIX F

SEVENTH APPELLATE DISTRICT
(Mahoning, Columbiana, Carroll, Jefferson, Harrison Belmont, Noble & Monroe Counties, Ohio)

Unreported Cases Where Counsel Suggests The Appeal Is Frivolous

State v. Salina (3-31-81) Col. App. No. 80-C-24, †

State v. Carlisle (4-29-81) Mah. App. No. 79-CA-151

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State v. Earich (7-14-81) Col. App. No. 79-C-62

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APPENDIX G

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State v. Reisinger (10-27-82) Clin. App. No. 428, *
State v. Gayhart (10-27-82) But. App. No. CA81-07-0062, *
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No. CA86-07-099, *, #

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No. CA86-04-028, *, #

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No. 87-6116

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

STEVEN ANTHONY PENSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

BRUCE S. ROGOW
Nova University Law Center
3100 S.W. 9th Avenue
Ft. Lauderdale, FL 33315
(305) 524-2465

On Behalf of Amicus Curiae,
National Association of
Criminal Defense Lawyers

QUESTION PRESENTED

WHEN A STATE APPELLATE COURT DETERMINES THAT AN INDIGENT CRIMINAL DEFENDANT'S APPEAL RAISES ARGUABLE ISSUES, MUST THE COURT PROVIDE THE DEFENDANT WITH COUNSEL TO BRIEF AND ARGUE HIS OR HER APPEAL, OR MAY THE APPELLATE COURT DECIDE THE MERITS WITHOUT APPELLATE ADVOCACY ON BEHALF OF THE DEFENDANT?

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers. NACDL was founded over twenty-five years ago to advance the

knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of these objectives, and of the criminal justice system, is the protection of an individual's constitutional right to counsel.

The decision of the Ohio Court of Appeals presents a threat to the right of counsel. This Brief supports the Petitioner's argument that the decision below should be reversed and petitioner provided with counsel to pursue a fresh appeal of his criminal conviction.

Both parties have consented to the filing of this Amicus Curiae Brief.

SUMMARY OF ARGUMENT

The Ohio appellate court should have provided counsel to Penson once it recognized his arguments on appeal were not frivolous. Appellate advocacy plays an essential role in appellate adjudication. Legal philosophers leave no doubt that the briefs and arguments of appellate lawyers contribute to the integrity of the process. When the court below chose to decide the merits of Penson's case without the benefit of counsel it violated Anders v. California, 386 U.S. 738 (1967) and its own duty to have utilized an adversarial system designed to insure wisdom and integrity in the appellate process.

ARGUMENT

THE OHIO COURTS' FAILURE TO PROVIDE PETITIONER WITH THE ASSISTANCE OF COUNSEL ON APPEAL VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Anders v. California, 386 U.S. 738,744 (1967) permitted an appellate court, faced with counsel's submission that no arguments supported reversal, to fully examine all the proceedings and to decide whether the appeal is frivolous. The Court wrote:

> If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

In this case the Ohio Court of Appeals examined the record and rejected the "Anders brief" submitted by Penson's counsel:

> Initially, this court is troubled by the filing of an Anders brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants Brooks and Smith's counsel in their respective appeals.
>
> J.App. 40-41.

The Ohio court then proceeded to decide Penson's case based upon its affirmances of his co-defendants' cases, saying its thorough consideration of their claims meant that Penson "suffered no prejudice in his counsel's failure to give a more conscientious examination of the record." J.App. 40-41.

Simply put, Penson did not have appellate counsel, and the Ohio court decided his case without written or oral advocacy on his behalf. The plain language of Anders required that advocacy once the court recognized Penson's appeal was not frivolous.

Following Anders would have protected Penson. It also would have protected the integrity of the process of appellate decisionmaking. This Brief brings to the Court's attention a brief sampling of the views of respected writers who have spoken about the important role an appellate advocate plays in assisting proper appellate decisionmaking. Their comments support the conclusion that providing counsel in arguable cases serves both the Constitution and the courts.1/

1/ Appellate advocacy literature is extensive, and while there are differing views on the importance of oral argument,
(continued next page)

John W. Davis spoke strongly of advocacy's importance:

> Says Lord Coke, "No man alone with all his uttermost labors, nor all the actions in them, themselves by themselves out of a court of justice can attain unto a right decision; nor in court without solemn argument where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right.

Davis, The Argument on Appeal, 20 A.B.A. Journal 895,896 (1940). In this case there was neither written nor oral advocacy for Penson. A court should not have to forge its own tools:

1/ (continued from prior page)
no commentators disagree about the critical nature of a brief on appeal. Two articles which offer insights into the oral advocacy question also provide a helpful compilation of the literature. Martineau, The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom, 72 Iowa L.Rev. 1 (1986) and Bright, The Power of the Spoken Word: In Defense of Oral Argument, id., at 35.

> [Courts] are anxiously waiting to be supplied with what Mr. Justice Holmes called "the implements of decision." These by your presence you profess yourself ready to furnish.
>
> Id.

Judge Aldisert concurred forty years later:

> Although appellate court decisions are the work product of a collegial body, the primary tools for making and justifying the decisions are the briefs submitted by the lawyers. The basic distinction between professional responsibility in the two systems [common law and civil law] is that, in the common law tradition, the chief responsibility falls on the lawyers; in the civil law tradition, it falls on the judges.
>
> Aldisert, The Appellate Bar: Professional Responsibility and Professional Competence--A View From the Jaundiced Eye of One Appellate Judge, Capital Univ. L.Rev. 445, 455 (1982).

The common law's reliance on counsel was one of the subjects of Karl Llewellyn's The Common Law Tradition, Deciding Appeals (1960):

> The American appellate judicial tribunal moves into its deciding only after argument by trained counsel--argument always written and mostly oral as well. If the explicit issue-drawing directs, narrows, sharpens the deciding process; if limitation of available "fact"--material by the trial record renders the deciding an operation bounded and semitraceable, and insofar more reckonable and testable, by way of its fact foundation; then the regime of argument renders the deciding also a process oriented partly from without by analysis, by arrangement of data, and by persuasions: oriented, however, not by judicially-minded helpful consultants but by adversaries to each of whom the tribunal serves either as an obstacle or as a tool, or, more commonly, as both at once.

Id., at 29-30. Llewellyn continues:

> What is clear is that if counsel's business has been properly done, the very pleadings have in quiet factuality "made the stones speak" and the reason sing--to this court.
>
> Ibid., at 232.

No one spoke or sung to the Ohio Court of Appeals on behalf of Steven Penson. By its own admission that court acknowledged the room for doubt in Penson's case. Stare decicis did not demand a complete rejection of his claims as devoid of merit; the court needed to judge, it needed to match the facts of Penson's record to the law--a delicate task:

> It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him.
>
> Cardozo, The Nature of The Judicial Process (1921), p.21.

Penson was the litigant before the court. The court decided that Penson's counsel had not provided them with the assistance necessary to hear and decide his appeal. From a judging standpoint the question is not whether that failure was harmful to Penson; it is whether that failure affected the integrity of the judicial process. No one can seriously suggest that appellate judicial decision-making, sans argument of counsel presents an effective model.

Rejecting the Ohio court's attempt to dispense with counsel in a non-frivolous case will protect the integrity of the appellate process in indigent criminal appeals, will protect the appellate rights of indigent criminal defendants, and will also serve the interests of judicial efficiency. If an appellate court rejects an Anders brief, undertakes its own

"representation" to decide the case on the merits, and then must justify its actions under a harmless error analysis and an ineffective assistance of counsel standard, a simple appeal has become a complicated constitutional case.

Common sense condemns that result. Law and logic compel the conclusion we urge: when an appellate court finds that an Anders brief was not justified it should appoint counsel who will submit an advocate's brief (and argument if appropriate) on the appellant's behalf. Anders required that much; an appreciation of the principles of appellate advocacy suggests nothing less will suffice.

CONCLUSION

For the foregoing reasons the decision below should be reversed. This case should be remanded to the Ohio Court of

Appeals with directions to that Court to reinstate the case so that Steven Penson may be represented by counsel on his appeal.

Respectfully submitted,

BRUCE S. ROGOW
Nova University Law Center
3100 S.W. 9th Avenue
Ft. Lauderdale, FL 33315
(305) 524-2465

On Behalf of Amicus Curiae,
National Association of
Criminal Defense Lawyers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing "Amicus Curiae Brief of the National Association of Criminal Defense Lawyers in Support of the Petitioner" have been furnished by U.S.Mail to (1) MARK B. ROBINETTE, Special Assistant Prosecuting Attorney, 20 E. Tabb Street, Suite 101, Petersburg, Virginia 23803, Counsel for Respondent, and (2) GREGORY L. AYERS, Chief Counsel, Ohio Public Defender Commission, Eight East Long Street, 11th Floor, Columbus, Ohio 43266-0587, Counsel for Petitioner, on this 21 day of April, 1988.

BRUCE S. ROGOW

lm-d34